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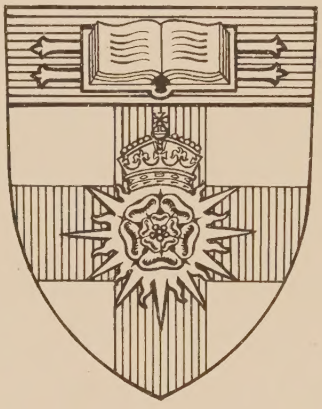

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CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY.

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

SOCIÉTÉ ANONYME DES MANUFACTURES DE GLACES *v.* TILGHMAN'S PATENT SAND BLAST COMPANY.

C. A.
1883
PEARSON, J.
May 31.
C. A.
Nov. 3.

[1883 S. 2106.]

Patent—License—Foreign Patent—Right to sell Articles in England—Interim Injunction—Circular warning against Infringement of Patent—Balance of Convenience.

The Defendants, who were the owners of patents in *Belgium* and *England* for an invention for making glass lamp globes, by a deed executed in *Belgium* granted a license to the Plaintiffs to manufacture articles under their invention in *Belgium*, but not elsewhere. The deed contained a clause for submitting disputes to arbitration. The Plaintiffs under this license manufactured articles in *Belgium* and sold them in *England*. The Defendants issued a circular warning persons engaged in the trade that the importation and sale of articles made in foreign countries under their invention, except by themselves, would be a violation of their patent. The Plaintiffs brought an action to restrain the issue of this circular until the matters in dispute had been determined by arbitration.

Held (affirming the decision of *Pearson*, J.), that the grant of the license to use the patent in *Belgium* did not imply permission to sell the manufactured article in *England* in violation of the Defendants' English patent.

Betts v. *Willmott* (1) distinguished.

Where a trade circular is issued *bonâ fide*, an interim injunction will not

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(1) Law Rep. 6 Ch. 239.

529

C. A.

1883

SOCIÉTÉ ANONYME DES MANUFACTURES DE GLACES *v.* TILGHMAN'S PATENT SAND BLAST COMPANY.

be granted to restrain it unless it is in violation of some contract between the Plaintiff and Defendant, however much the balance of convenience may be in favour of granting it.

THE Plaintiffs were a company incorporated under the law of *Belgium*, and carrying on business at *Brussels*.

The Defendants, who were an English joint stock company, were the owners of a patent obtained in *Belgium* for a process invented by *B. C. Tilghman* for cutting and grinding stones, metals, and other hard substances. The invention was used for obscuring and ornamenting glass lamp globes and similar articles.

By an agreement made in *Belgium*, and drawn up in the French language, dated the 11th of July, 1878, the Defendants granted to the Plaintiffs "full and entire liberty, power, and authority during the continuance of the patent for the term of twenty years to employ the said invention and to put it into practice for all articles of glassware thereafter named, at its manufactory of *Val St. Lambert*, and not elsewhere," on certain conditions, and subject to certain royalties therein stated.

The agreement contained a clause providing that if any discussion or dispute should arise as to the purport of the agreement, or as to any doubtful point relating thereto, or in any manner whatsoever arising therefrom, the question should be referred to arbitration, which should be held in accordance with the laws and regulations of the Code of Procedure in force.

The Defendant company were the owners of a patent for the same invention taken out in *England*.

The Plaintiffs manufactured under the Belgian patent large quantities of glass lamp globes and other glass articles, which they sold not only in *Belgium*, but also in *England*.

The Defendants on ascertaining that these articles were sold in *England*, issued two circulars, one dated the 24th of October, 1882, and the other the 29th of January, 1883, warning persons engaged in the trade that the importation or sale in this country of foreign lamp or gas globes, or shades, which had been decorated or obscured abroad by the employment of the sand blast process, was an infringement of the Defendants' patent, and threatening legal proceedings against persons who might be guilty of such infringement.

The Plaintiffs called upon the Defendants to submit the differences between them to arbitration, and commenced the present action asking for an injunction to restrain the Defendants from publishing these circulars or any other circulars representing that the Plaintiffs were not entitled to sell in *England* the articles manufactured by them under their Belgian patent, until the right to sell the said articles in *England* had been determined by arbitration, as provided by the agreement.

The Plaintiffs then moved for an interim injunction in terms of the claim.

The Plaintiffs filed an affidavit to prove that they had been led by the Defendants to believe when they entered into the agreement of the 11th of July, 1878, that they would be at liberty to sell in *England* the articles manufactured under the patent in *Belgium*. But this was denied by the Defendants.

The motion came on for hearing before Mr. Justice *Pearson* on the 31st of May, 1883.

Cookson, Q.C., and *Farwell*, in support of the motion, cited *Clark* v. *Adie* (1); *Betts* v. *Willmott* (2); *Neilson* v. *Betts* (3).

Aston, Q.C., and *W. R. Bousfield*, for the Defendants, relied on *Von Heyden* v. *Neustadt* (4); *Halsey* v. *Brotherhood* (5).

PEARSON, J.:—

I think the facts stated before me are not sufficient, on the present occasion, to enable me to grant this injunction. I do not propose to give any opinion upon the question which will be raised on the hearing of this matter, because I say distinctly that I am deciding this upon materials which do not enable me to come to any proper conclusion as to the rights of the parties, and it seems to me that any plaintiff who brings forward a motion of this kind is bound to supply the Court with such accurate information on the subject, so far as his means go, as will enable the Court to see that in granting the motion it is at all events

(1) 21 W. R. 456.
(2) Law Rep. 6 Ch. 239.
(3) Law Rep. 5 H. L. 1.
(4) 14 Ch. D. 230.
(5) 19 Ch. D. 386.

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granting it under circumstances which, if proved at the trial, will render the injunction a proper injunction to have been granted.

The facts stated here are simply these:—In the month of July, 1878, a contract was entered into between the Plaintiffs and Defendants in this action, under which the Plaintiffs received from the Defendants a license with "full and entire liberty, power, and authority during the continuance of the patent for the term of twenty years"—that shews that the patent was the Belgian patent mentioned, and not the English patent, because the English patent only ran for fourteen years,—"for the term of twenty years to use and employ the said invention, which has been patented" by a gentleman named *Tilghman*. It is said that it not only conveyed the right to manufacture the goods in *Belgium*, about which there is no dispute, but that it conveyed to the licensees the right, when these goods had been manufactured, to sell them in *England;* and it is further stated that although a patent has been taken out in *England*, seeing that that patent is vested in the Defendants, the Defendants cannot set up their English patent against the sale of articles manufactured under their license in *Belgium*. If it appeared clearly to me that this had been a contract by the *Tilghman Patent Sand Blast Company, Limited*, being at that time possessors of the Belgian patent, and being also at that time possessors of the English patent, without deciding the question, which might be left open for conclusive argument on the hearing, I should have felt very much disposed to say, upon the authority of the *dictum* in *Betts* v. *Willmott* (1), that I was justified in granting a provisional injunction, that is, if I came to the conclusion that upon the balance of convenience and inconvenience it was better to grant an injunction than to order an account to be kept. I believe I should have the right to grant a provisional injunction if I thought it expedient so to do. But upon looking at the contract I cannot ascertain—and there is no evidence outside the contract—that the Defendant company, when that contract was signed, granted the license in *Belgium* as owners of the Belgian patent, or under some other authority, for upon the materials

(1) Law Rep. 6 Ch. 239.

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before me it may well be that one person is the owner of the patent in *Belgium* and the company are the owners of the patent in *England*; that they are, in fact, two distinct rights vested in two distinct parties. If that be so, then I cannot at the present moment see how a grant of the license under the Belgian patent would confer the right of importing goods into *England*, which would be an infringement of the English patent.

Now the matter being, as I say, left doubtful in my mind as to what the real circumstances of the case at the time when this contract was entered into were, I come to the conclusion on the present materials before me, that I cannot by any possibility grant the injunction which is asked for, and I therefore refuse the motion.

The costs will be costs in the action in the usual manner.

I am not deciding anything, and I purposely avoid deciding anything, because if the Plaintiffs should get further evidence and bring a similar motion on before me, I should then have to decide the case upon that evidence.

T. W. G.

C. A.

From this order the Plaintiffs appealed. The appeal was heard on the 3rd of November, 1883.

Cookson, Q.C., and *Farwell*, for the Appellants:—

The license granted by the Defendants to the Plaintiffs to manufacture the articles under the patent necessarily implies a license to sell the articles when made, and there being no restriction in the agreement as to the place of sale, a right is implied to sell in *England* as well as in *Belgium*: *Betts* v. *Willmott* (1). No doubt if the English patent belonged to a third party, his rights could not be interfered with, but here the grantors of the license were themselves the patentees in *England*, and they cannot derogate from their own grant. It is our contention that the Defendants led us to believe that we should have power to sell the glass globes in *England*, and if they did not actually mislead us, they knew that we intended to sell them in *England*, and they ought to have warned us that they should prevent

(1) Law Rep. 6 Ch. 239.

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our doing so. The grant ought to be construed strictly against them: *Clark* v. *Adie* (1); *Redgrave* v. *Hurd* (2). In *Halsey* v. *Brotherhood* (3) there was no such relation between the plaintiff and defendant as there is here.

This is a contract in the French language made in *Belgium*, and the arbitrator in *Belgium* will be better able to construe the agreement according to the intention of the parties than this Court. It is therefore right that the case should not be prejudged here, but left to be decided by the arbitrator.

The balance of convenience ought to be considered in a case like the present, and that is in favour of the injunction. For if the injunction is refused we shall be injured in our business, perhaps irremediably; but if the injunction is granted no injury will happen to the Defendants, as we will undertake to keep an account of all articles sold: *Thomas* v. *Williams* (4); *Saxby* v. *Easterbrook* (5); *Hill* v. *Hart-Davies* (6).

[COTTON, L.J., referred to *Lister* v. *Leather* (7).]

Aston, Q.C., and *W. R. Bousfield*, for the Respondents, were not called on.

COTTON, L.J.:—

This is an application by way of appeal from Mr. Justice *Pearson* asking for an interim injunction to restrain the issuing by the Defendants of certain circulars of which the Plaintiffs complain.

The nature of these circulars is this: the Defendants have an English patent, and they are sending round circulars warning certain persons from buying articles made in accordance with the invention not manufactured by them and not bought from them, and warning them that if they use those articles in *England* actions will be brought against them. We must assume that those circulars are honestly issued: that is to say, that they are issued by the Defendants in the belief that they are required

(1) 21 W. R. 456.
(2) 20 Ch. D. 1.
(3) 19 Ch. D. 386.
(4) 14 Ch. D. 864.
(5) 3 C. P. D. 339.
(6) 21 Ch. D. 798.
(7) 8 E. & B. 1004.

for the protection of their right to the invention. But the Plaintiffs are the licensees of a Belgian patent for the same invention. I believe there is some little distinction between the inventions, but it has not been relied on, and it is not material. The Plaintiffs say the Defendants granted to them the right to use the Belgian patent for this invention, and that these circulars issued by the Defendants are an interference with the rights granted to the Plaintiffs by that license.

Now one point that was pressed upon us was that there was in the contract between the Plaintiffs and the Defendants a clause providing that if any difficulty arose under the agreement it should be referred to arbitration in *Belgium*, and that this was a Belgian instrument the construction of which belongs to the Belgian tribunal which has been selected by the parties, and we are asked, independently of anything else, to grant an injunction until reference can be made to the Belgian tribunal, and the true interpretation of this contract can be decided. But, in my opinion, that will not enable the Plaintiffs to obtain this injunction if they otherwise fail. There is no evidence at all before us that by Belgian law this contract has a different interpretation or effect from that which it has according to the construction which we as English lawyers should put upon it. In my opinion it would be wrong, if *primâ facie* according to the construction of the instrument the Plaintiffs have no right, to grant the injunction simply on the ground that it is probable or possible that the Belgian tribunal may take a different view, there being no evidence that in any way supports the contention that the Belgian law differs from English law in this respect.

Then I come to consider how the case stands on the construction of this instrument. It is put in this way, that the Defendants being the owners of the English patent and having the right to grant licenses of the Belgian patent, have by the grant of a license to use the Belgian patent precluded themselves from insisting on their right to say that the sale in *England* of these articles is an interference with the monopoly granted to them by the English patent. And it is contended as I understood the argument, that although there is not in express terms in this license any grant of a right to sell these things in *England* when

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the Plaintiffs have manufactured them under this license in *Belgium*—yet it is necessarily implied, and it is a right which is necessarily carried to the Plaintiffs by the grant of the license which the Defendants have made to them. In my opinion there is a fallacy there. This grant was simply a grant to the Plaintiffs of a license to exercise the invention in *Belgium*, notwithstanding the existence there of a patent which would otherwise have prevented them from manufacturing the articles or dealing with the invention in *Belgium*. That was the grant. The consequence of that grant undoubtedly would be that the articles made under the invention, so far as the Belgian patent is concerned, would under that license be lawfully made by the Plaintiffs in *Belgium*, and they having made the goods would be in the position of lawful owners of these goods without any violation of rights under the Belgian law. And the consequence of that would be that they might sell these goods in any country where there was no right of any person interfering with the sale in that country, or where the municipal law of the country did not prevent the sale of them. It is the consequence of their being in *Belgium* lawful manufacturers and lawful owners of these goods, and incident to that ownership that they can sell anywhere where the law of the country does not prevent them selling. But there is no grant there of a right to sell in *England*. That would be a right incident to their legal position in *Belgium*, but would not be a right granted to them by this instrument; and the mere fact that the grantors of the license had a monopoly in *England* would not, in my opinion, import as a matter of construction into this instrument the grant of a right to interfere with that monopoly when there had been no express grant of a right to sell in *England*. Of course it might be a question whether, if there was any fraudulent misrepresentation or concealment on the part of the Defendants when they entered into this contract, the Court would set it aside on that ground, or whether if they applied to a Court in *England* their conduct might have been such as to prevent them insisting on their rights. But there is no such case before us here, and in my opinion there is no grant to be implied on the construction of the agreement that the Plaintiffs shall be at liberty to sell in *England*. The

license is merely a license, and puts the Plaintiffs in no better position than if they were grantees of the Belgian patent.

That being so, in my opinion the Plaintiffs fail to make out any *primâ facie* case to shew that these circulars, honestly issued, are in derogation of any contract which the Defendants entered into with the Plaintiffs; and I may say, for my own part, I think that where circulars of this kind are honestly issued the Court ought not to interfere, at least till the hearing of the cause, to stop the circulation of them, unless there is a very strong *primâ facie* case on the evidence before the Court that there is a violation of some contract entered into between the Plaintiffs and the Defendants. Here the Defendants are sending the warning to merchants and others. You could not prevent them from bringing an action against those merchants, and is it to be said that they are to be stopped from warning those merchants that they render themselves liable to actions, when those merchants would naturally complain if an action were brought against them after they had been allowed to go on buying these imported goods without warning?

A case was referred to, which it was said Mr. Justice *Pearson* would have acted upon but for the point which was relied on, viz. that in respect of the Belgian patent the Defendants were agents only, whereas they were owners of the English patent. That was the case of *Betts* v. *Willmott* (1), which I think would not be an authority for what the Plaintiffs are here contending for. In that case the owners of the English and foreign patents had sold abroad things manufactured in a foreign country. In my opinion the license to use a patented invention under a foreign patent stands in a very different position from the sale of an article manufactured under either a foreign or an English patent. When an article is sold without any restriction on the buyer, whether it is manufactured under one or the other patent, that, in my opinion, as against the vendor gives the purchaser an absolute right to deal with that which he so buys in any way he thinks fit, and of course that includes selling in any country where there is a patent in the possession of and owned by the vendor. Here, as is pointed out, it is simply a license to manufacture.

(1) Law Rep. 6 Ch. 239.

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In my opinion, though I do not so decide it for the same reasons, Mr. Justice *Pearson* is right in this matter. The appeal must, therefore, be dismissed with costs.

LINDLEY, L.J.:—

I also think we cannot properly grant an injunction in this case. It appears that the Plaintiffs are licensees of a Belgian patent, a Belgian patent which at that time belonged substantially to the Defendants. And the first question is what rights did the Defendants convey to the Plaintiffs? As set out in the documents in the statement of claim they gave the right to use this patent in *Belgium*. It is said that is a question of Belgian law, but we know enough about patent laws in general to understand what that means. It is contended that it gives the Plaintiffs the right to use this patented invention in *Belgium*, to make the patented articles at a particular place named in the agreement, and to sell them in *England*. The Belgian patent would have no force or effect at all outside *Belgium*. It is not by reason of the Belgian patent that the Belgian patentee can make or sell in *England*. A man may make or sell things in *England* whether he has a Belgian patent or not. It appears to me to be a fallacy to say that because a man has got a Belgian patent he has in consequence under the Belgian patent the right to do anything in *England*. He has no right at all in *England* by virtue of his Belgian patent. By means of that patent he becomes the owner of certain things in *Belgium*, and as owner of them he can sell them anywhere where he is not restrained. Now if I could find in this agreement any reference whatever to *England* or any indication that the grantor conveyed or purported to convey any right whatever to make or do anything in *England*, I should then feel the full force of the Appellants' contention that the Defendants were derogating from their own grant. But I cannot find anything of the kind. Whether there was or was not any fraudulent concealment by them of the English patent, or whether there was or was not any representation, verbally or otherwise, that the Plaintiffs in this case would be entitled to sell in *England* the things made in *Belgium*, I do not know; but in the absence of evidence proving that, and looking at the

document alone, the case stands simply in this way: The Defendants have two patents, they grant one of them and they say nothing about the other. They reserve, therefore, to themselves whatever rights they may have under the other, unless there was some fraudulent concealment or misrepresentation. That strikes at the root of the whole thing. Whether that is the same view which may be taken by a Belgian Court as to the true construction of this document, we do not know; we have not the materials before us for forming an opinion as to the Belgian law on this matter, or judging whether it differs from ours or not; and the same observation applies to the view that the Belgian Court might take of the arbitration clause.

It appears to me in the absence of all information about the Belgian law, and applying our own minds to this document and the way it was put before us, the Plaintiffs are not entitled to this injunction on the evidence as it now stands.

Then it is said the balance of convenience would be in favour of granting this injunction. I think it would be so if the Plaintiffs could make out a reasonably strong *primâ facie* case; I think the Appellants' argument upon that point would be, as far as I can see without having heard the other side, unanswerable. It is an irreparable injury to them not to restrain these circulars, and it is no particular injury to the Defendants to allow them to go on with what they have been doing, they keeping an account. But then we must consider the rights of the parties, and the Plaintiffs are not entitled to restrain the Defendants from issuing these circulars unless they can shew some right, which they have not succeeded in doing.

It appears to me, therefore, the appeal should be dismissed.

Solicitors for the Plaintiffs: *Pritchard, Englefield & Co.*
Solicitors for the Defendants: *Cooper & Walker.*

M. W.

C. A.
1883
Nov. 5.

MARTIN *v.* EARL BEAUCHAMP.

[1883 M. 1282.]

Second Suit for same Matter—Costs of former Suit—Staying Proceedings.

A bill for an account of the personal estate of *W. J.*, an intestate, was filed by the legal personal representative of *E. B.* against the personal representatives of the deceased administrators of *W. J.*, alleging that the administrators of *W. J.* had got in the greater part of the estate, and that *E. B.* was the sole next of kin. The suit was revived in 1877 by *M.*, a subsequent personal representative of *E. B.*, against *X.* and *Y.*, as representatives of one of the administrators, and *Z.*, as representative of the others, and was ultimately dismissed in 1880 with costs as against all three Defendants on the ground that the title of *E. B.* as next of kin was not proved. After this *M.* took out administration *de bonis non* to *W. J.*, and brought his action as such administrator against *Z.* for an account of the personal estate of *W. J.* received by the administrators whom *Z.* represented:—

Held (affirming the decision of Mr. Justice *Pearson*), that although *M.* formerly sued as personal representative of *E. B.*, and now sued as personal representative of *W. J.*, the action was in substance a second proceeding for the same matter under the same alleged title, and that proceedings must be stayed until the costs of the old suit had been paid.

THIS was an appeal by the Plaintiff from an order of Mr. Justice *Pearson* staying proceedings until the costs of a former suit had been paid.

In the year 1859 *Joseph Martin* filed his bill alleging that *William Jennens* died in 1798 a bachelor and intestate, except as to a will by which he directed his debts to be paid, and devised to his mother, who died in his lifetime, all his estates in *Suffolk* and *Essex* for her life. That on the 6th of July, 1798, letters of administration of the personal estate of *Jennens* were granted to *William Lygon*, afterwards Earl *Beauchamp*, and *Mary* Dowager Viscountess *Andover*, who claimed to be two of his next of kin, and that they got in the greater part of his personal estate and divided it equally between them. The Plaintiff, who was the legal personal representative of one *Elizabeth Bunch*, alleged that she was in fact the sole next of kin. The Plaintiff further alleged

that on the death of Earl *Beauchamp*, who survived Lady *Andover*, his widow, *Catherine* Countess *Beauchamp*, took out administration to *Jennens* and got in the rest of the personal estate. The bill was filed against the personal representatives of Earl *Beauchamp* and *Catherine* Countess *Beauchamp* and the personal representatives of Lady *Andover*, and prayed for an account of the personal estate of *Jennens*, alleging that the several persons to whose hands it had come had kept it separate for the benefit of the next of kin when they should be ascertained. In 1875 *Isaac Martin* became the legal personal representative of *Elizabeth Bunch*, and in 1877 he as such representative revived the suit against the Honourable *Mary Howard* as representative of Lady *Andover*, and *Frederick* Earl *Beauchamp* as representative of *William* Earl *Beauchamp* and *Catherine* Countess *Beauchamp*. *Mary Howard* having died, the suit was revived against the Hon. *Arthur Upton* and *F. A. Coe* as her executors. The bill was several times amended, and finally, in June, 1879, after which it stood as a bill by *Isaac Martin* against *Upton*, *Coe*, and *Frederick* Earl *Beauchamp*.

On the 16th of March, 1880, the bill was dismissed with costs, on the ground, as it was stated, that the Plaintiff failed to prove the title of *Elizabeth Bunch* as next of kin.

On the 3rd of May, 1882, *Isaac Martin* obtained a grant of letters of administration with the will annexed of the personal estate of *Jennens* left unadministered by *William* Earl *Beauchamp*, Lady *Andover*, and *Catherine* Dowager Countess *Beauchamp*.

In 1883 *Isaac Martin*, as administrator with the will annexed of the personal estate of *Jennens* left unadministered, commenced this action against *Frederick* Earl *Beauchamp*, as legal personal representative of *William* Earl *Beauchamp* and of the Dowager Countess *Beauchamp*, to have an account taken of all personal estate of *Jennens* come to the hands of *William* Earl *Beauchamp* and *Catherine* Dowager Countess *Beauchamp* respectively.

On the 4th of May, 1883, Mr. Justice *Pearson* in Chambers made an order staying all proceedings in this suit till the costs given by the order of the 16th of March, 1880, which had been taxed at £279 7*s.* 3*d.*, had been paid. The Plaintiff appealed.

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Owen, for the Appellant:—

The rule is, as laid down in *Randle* v. *Payne* (1), that "if a suit is dismissed with costs the same plaintiff cannot proceed in another suit for the same objects until the costs of the first action have been paid." Here the two proceedings relate to the same estate, but their objects are different; the former suit claimed the property for the estate of *Elizabeth Bunch*; the object of the present action is to have the fund distributed among the next of kin whoever they may be. Proceedings will not be stayed in the second suit where the second bill could not be produced by a fair amendment of the first: *Budge* v. *Budge* (2). Here the Plaintiff sues under an entirely different title from that set up in the first suit, so that no allowable amendment could make the first bill into the second. The actions are different; they are not between the same parties nor for the same purposes.

Kekewich, Q.C., and *E. Buckley*, *contrà*, were not called upon.

COTTON, L.J.:—

This is an appeal from an order of Mr. Justice *Pearson* staying proceedings in this action until the costs of a former suit have been paid. The present action is by the Plaintiff, as administrator *de bonis non* with the will annexed of *William Jennens*, against *Frederick* Earl *Beauchamp* for an account of the estate of *Jennens* received by some of the former personal representatives of *Jennens*. The former suit was brought by *Joseph Martin* as legal personal representative of *Elizabeth Bunch*, who was alleged to be the sole next of kin of *Jennens*, against the legal personal representatives of the former personal representatives of *Jennens*. *Joseph Martin* having died the suit was continued by the present Plaintiff, as the legal personal representative of *Elizabeth Bunch*, against *Upton* and *Coe*, as representing one of the former representatives of *Jennens*, and *Frederick* Earl *Beauchamp*, as representing the others; and it was dismissed in 1880 with costs, on the ground, as we are informed, that the title of *Elizabeth Bunch* as next of kin was not proved.

(1) 23 Ch. D. 288. (2) 12 Beav. 385.

The rule is established that where a plaintiff having failed in one action commences a second action for the same matter, the second action must be stayed until the costs of the first action have been paid. Here the Defendant is only one of the Defendants in the old suit, but he is sued in the same character as before. The Plaintiff in the former suit sued as personal representative of *Elizabeth Bunch*, he now sues as administrator *de bonis non* of *William Jennens*. But though he is not suing in the same character as that in which he formerly sued, he is suing substantially by virtue of the same alleged title. If he recovers any part of this estate from the Defendant he will recover it as a trustee for the estate of *Elizabeth Bunch*, and I am of opinion that he is to be treated as bringing a second suit for the same matter as the former.

LINDLEY, L.J.:—

I am of the same opinion. There is some technical difficulty in the case, for the Plaintiff formerly sued as personal representative of *Elizabeth Bunch*, but now he sues as personal representative of *William Jennens*. I think, however, that the technical difficulty is not insuperable, and that we are not prevented by it from saying that this is really and substantially a second action for the same matter.

Solicitors for Plaintiff: *Harper & Batteock.*
Solicitors for Defendant: *Walfords.*

H. C. J.

C. A.
1883
KAY, J.
June 9.
C. A.
Nov. 6.

In re McRAE.
FORSTER *v.* DAVIS.
NORDEN *v.* McRAE.

[1883 M. 330.]

Practice—Conduct of Proceedings—First Action defective—Action by Joint Creditors for Administration of Separate Estate of deceased Partner.

A creditor of a partnership firm brought an administration action against the executor of a deceased partner. Afterwards a separate creditor of the same partner brought an administration action against the executor, and obtained judgment:—

Held, on an application by the Plaintiff in the first action for the conduct of the proceedings in the second action, that a joint creditor of a firm could not maintain a simple action for the administration of the estate of a deceased partner, and therefore that the first action was not properly constituted. The application of the Plaintiff was consequently refused.

Decision of *Kay*, J., affirmed.

THE testator, *John McRae*, was in partnership with his son *Edwin McRae* in the business of leathersellers, under the style of *E. McRae & Co.*

G. R. Forster, the Plaintiff in the action of *Forster* v. *McRae*, supplied goods to the partnership, or, as he alleged, to the testator alone, and took in payment a bill of exchange accepted by *E. McRae & Co.* This bill was never paid.

The testator died on the 30th of December, 1882, having by his will appointed *H. Davis* and his widow *Sarah McRae* his executors.

On the 26th of January, 1883, *Forster* issued the writ in the first action in the Court of Mr. Justice *Fry* against *H. Davis* alone, on behalf of himself and all other creditors of the testator for the administration of his estate and for a receiver.

On the 31st of January *L. W. Norden*, a separate creditor of the testator, issued the writ in the second action—*Norden* v. *McRae*—in the Court of Mr. Justice *Kay*, on behalf of himself and all other creditors for the administration of the testator's estate. The Defendants to this action were *H. Davis* and Mrs. *McRae*.

On the 14th of February the will was proved by Mrs. *McRae* alone.

On the 15th of February *Norden* obtained judgment in the second action with the consent of the Defendants.

Edwin McRae, the surviving partner, was a liquidating debtor.

On the 1st of March, 1883, the Lord Chancellor made an order transferring the first action to the Court of Mr. Justice *Kay*.

The Plaintiff *Forster* then took out a summons asking that the future conduct of the action of *Norden* v. *McRae* might be given to him. The summons was adjourned into Court and heard by Mr. Justice *Kay* on the 9th of June, 1883.

E. Cutler, for the Applicant.

Crossley, Q.C., and *Alexander*, for *Norden*.

Brinton, for *Davis*.

Renshaw, for Mrs. *McRae*.

KAY, J.:—

I am strongly in favour of supporting the ordinary rule that if a writ is issued for administration by a person, and then afterwards another person with knowledge of the writ issues another writ for that purpose, the plaintiff in the first action should have the conduct of the proceedings. That is a rule which has had a most beneficial effect, because it has prevented a great many of those unseemly contests for the conduct of a cause which used to be so frequent. In all those cases the plaintiff in the first action must have that position which entitles him to the conduct of a creditor's action. In the present case the facts before me are these: The Plaintiff in the first action issues a writ asking for a receiver and for the administration of the real and personal estate of the deceased. It is a writ on behalf of himself and all other creditors asking for a receiver and injunction and costs, and other relief, and following the terms of the form of indorsement in the schedule to the General Order the writ is indorsed, the Defendant is sued as "the executor of the last will and testament, and trustee of the estate of *John McRae*, deceased."

The fact was that the Defendant, *Davis*, was only one of two

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executors, there was an executrix besides, and he was only one of the two trustees, therefore that writ was not properly issued, it was imperfect, and it was obviously issued in a hurry in order to have the first chance of getting an administration order. That alone causes some little hesitation. I think people ought to ascertain the facts before they issue writs, so as not to occasion expense and delay by amendment, but that is not the sole objection. At that time no person had proved the will at all. After that writ was issued another writ was issued by another person, who I am told was a separate creditor, against the executrix and *Davis* the other executor; but the executrix alone proved the will, the executor, the Defendant to the first suit, at present not having proved at all. Then an administration order was obtained by a summons in Chambers under Order xv., which allows proper accounts to be taken with all directions usual in similar cases, and under that it seems the practice has risen up of making an administration order. Well, in that state of things an application was made to the Lord Chancellor to transfer, and the Lord Chancellor thinking that Mr. *Davis* alone being the Defendant to this original writ was not sufficient, would not transfer the other action to the Court in which the first began, but transferred that action to the Court in which the second action began. That might not alone be enough to deprive the Plaintiff of his *primâ facie* right to have the conduct of that second action, but had he done that which is the right thing, he ought to have inquired first who were the proper persons to make Defendants. But there is besides a *bonâ fide* question whether the Plaintiff in this first action was not a mere creditor of the partnership in which the testator was interested, and not a separate creditor of the testator at all. It is true that for some purposes, which were explained in the well-known case of *Kendall* v. *Hamilton* (1), a partnership debt is joint and several in equity; but it is not several for this purpose, that a partnership creditor can institute an action of this kind representing himself to be a separate creditor totally ignoring his claim against the partnership. No doubt he can sue against the estate of the deceased partner, but he must make the surviving

(1) 4 App. Cas. 504.

partner a defendant in that action, for this reason, given years ago in *Wilkinson* v. *Henderson* (1), that the surviving partner is interested in the question as to the amount of his debt. Therefore the action instituted by the first Plaintiff was *primâ facie* altogether wrong, it was not an action in which he joined the surviving partner, it was not an action properly constituted in respect of his joint debt, and accordingly I am not satisfied that he is the proper person to have the conduct of this decree which has been made, and I therefore refuse this application with costs.

C. A.

The Plaintiff *Forster* served notice of appeal from this order on Wednesday, the 20th of June, 1883, for Monday, the 25th of June.

The appeal came on to be heard on the 6th of November, 1883.

On the appeal being opened,

Crossley, Q.C., for the respondent *Norden*, took the preliminary objection that four clear days' notice had not been given as required by Order LVIII., rule 4, Sunday not being reckoned: Order LVII., rule 2.

COTTON, L.J.:—We are both of opinion that having appeared you have waived the irregularity of the notice. We cannot now attend to the objection.

E. Cutler, for the Appellant:—

There is nothing in the facts of the present case to take it out of the ordinary rule that the plaintiff in the first action is entitled to the conduct of the proceedings. The Plaintiff's debt is not denied, but it is objected that he was a creditor of the partnership, not of the separate estate of the deceased partner. It is true that it was held in *Kendall* v. *Hamilton* (2) that a partnership debt was not joint and several; but the joint creditor has an interest in the separate estate of each of the partners, for if the partnership property is exhausted he has a claim upon the separate property. And for that reason he has a *locus standi* to bring an action to preserve and administer the separate property

(1) 1 My. & K. 582. (2) 4 App. Cas. 504.

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of a deceased partner: *Wilkinson* v. *Henderson* (1); *Seton* on Decrees (2). It is true that it was usual under the old practice to join the surviving partner, but here the firm is insolvent, and it would be only a waste of money to make the surviving partner a party.

Crossley, Q.C., and *Alexander*, for the Plaintiff *Norden*.

Brinton, for *Davis*.

Renshaw, for Mrs. *McRae*.

The counsel for the Respondents were not called on.

Cotton, L.J.:—

Undoubtedly the general rule that the conduct of the proceedings ought to be given to the Plaintiff in the first action ought to be adhered to, unless there is some special reason to the contrary. The rule is a very good one, and prevents persons from racing for the decree. If the first action in this case had been a properly constituted suit the Plaintiff under that rule would become entitled to the conduct of the proceedings. But that is not the case here. The Appellant is a creditor of the partnership. I do not say that for some purposes he might not have maintained an action to enforce his claim against the testator's separate estate. But he brings this action representing himself as a separate creditor, and seeks to get an administration decree as such. He is not a separate creditor at law, nor is he one in equity; the reason for his being sometimes called so, is shewn in *Kendall* v. *Hamilton* (3). No doubt when the Court is administering the separate estate it does not part with it till the joint creditors are paid. But there is no case in which a joint creditor has been allowed to obtain a decree for administration as a separate creditor. I am of opinion that Mr. Justice *Kay* was quite right in saying that this case is an exception to the general rule, and that the Plaintiff ought not to have the conduct of the proceedings. The appeal must, therefore, be dismissed.

(1) 1 My. & K. 582. (2) 4th Ed. p. 813.
(3) 4 App. Cas. 504.

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Lindley, L.J.:—

I am of the same opinion. Neither before nor since the *Judicature Acts* has a partnership debt been held to be the separate debt of the partners, nor has a partnership creditor ever had a right to maintain a suit or obtain a decree simply for the administration of the separate estate of a deceased partner. It is true that he might bring a suit against the representatives of the deceased partner and the surviving partner, and so obtain relief against the estate of the deceased partner, but the decree in that case would be quite different from that sought for here. The Plaintiff brings his action as a separate creditor, and asks for judgment for administration in the usual form. The first action is a defective action, and the Plaintiff is not entitled to the conduct of the proceedings.

Solicitors: *Scoles & Co.; H. Montagu; Williams & Bunn; Allen & Edwards.*

M. W.

NADIN *v.* BASSETT.

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Kay, J.
July 5.
C. A.
Nov. 7.

[1882 N. 1368.]

Practice—Special Examiner—Examination of Parties to the Suit—Rules of Court, 1875, *Order* xxxvii., *r.* 4—*Rules of Supreme Court*, 1883, *Order* xxxvii. *r.* 5.

A Plaintiff residing in *New Zealand* brought an action for redemption alleging himself to be the heir-at-law of a person who had died intestate entitled to a remainder in fee in the equity of redemption which had fallen into possession since his death. The Plaintiff's case was that he had been long resident in *New Zealand* and had had no communication with his family since 1860, and had only recently been informed of his title. The Defendant was a person to whom the property had been sold by a person whose elder brother the Plaintiff alleged himself to be. The Defendant did not dispute the Plaintiff's right to redeem if he was the person he represented himself to be, but required proof of his identity. The Plaintiff applied for a commission to examine himself, two persons named and others residing in *New Zealand*. Mr. Justice *Kay* made the order, and directed that the depositions might be given in evidence at the trial, "without prejudice to the right of the Defendant to cross-examine the Plaintiff at the

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trial in the presence of witnesses in *England* who can speak to his identity." The Defendant appealed from the order:—

Held, that there was jurisdiction to appoint examiners for the examination of a party to the cause as well as of a mere witness:

But, *held*, that the deposition of the Plaintiff ought not to be admitted at the trial if the Defendant required him to appear at the trial to be examined and cross-examined, it not being shewn that there was any practical impossibility of his attending:

Held, further, that the order need not be confined to witnesses mentioned in it by name, but that the Plaintiff must give notice to the other side in *New Zealand* of the witnesses he proposed to call.

THE case made by the statement of claim was to the following effect:—That in 1851 *Thomas Nadin* mortgaged a freehold property of about sixteen acres, called the "*Drumbers*," to *A. Brittlebank* for £770. That *Thomas Nadin* died in 1868, and that the Plaintiff was his second son and *Samuel Nadin* his third son. That *T. Nadin* left a will by which he gave his real estate to his wife *Hannah* for life, with remainder to his eldest son in fee, subject to legacies. That the eldest son died a bachelor and intestate in 1872, leaving the Plaintiff his heir-at-law; and *Hannah Nadin* died in 1874. That in 1859 the Plaintiff had gone to *New Zealand* where he had ever since resided, and since 1860 had never received any communication from any of his relations in this country, and only became aware of his title to the above property in September, 1881. That in February, 1877, *Samuel Nadin* agreed to sell the property to the Defendant for sums making together £1000. That in 1878 judgment was given in an action of *Bassett* v. *Nadin* in the Chancery Division for specific performance of the agreement, with costs, and that on the 25th of March, 1879, the property was conveyed to the Defendant by *Samuel Nadin* and the parties in whom the mortgage was vested. The Plaintiff claimed to redeem the property on payment of what should be found due on the mortgage of 1851.

The Defendant, by his statement of defence, admitted that if the Plaintiff was the person he alleged himself to be, he was entitled to redeem the property, but the Defendant did not admit the Plaintiff's identity.

The Plaintiff applied for the appointment of special examiners to examine witnesses in *New Zealand*, and on the 12th of June,

1883, Mr. Justice *Kay*, in Chambers, made an order appointing special examiners to examine "the Plaintiff, *David Swindail*, and *Richard Davies* and others residing in *New Zealand* aforesaid, on behalf of the Plaintiff," and directing that the depositions should be filed, and either party be at liberty to give them in evidence at the trial.

On the 5th of July, 1883, the Defendant moved to discharge this order.

Maclean, for the motion, contended that the case did not come within the Rules of Court, 1875, Order XXXVII., rule 4, or the *Judicature Act*, 1875, s. 24: *Warner* v. *Mosses* (1). The question was one of identity, and it was essential that the Plaintiff should appear in this country and his evidence be given in public. That was the Defendant's right, and the Court would not interfere with it.

A. C. Eddis, contrà.

KAY, J., after reading Rules of Court, 1875, Order XXXVII., rules 1 and 4 said:—

There is a small property in *Staffordshire*, the net value of which, after payment of a mortgage and other charges (which it is admitted are paramount charges) is about £400. The Plaintiff is now and has been for many years—over twenty-four—resident in *New Zealand*. He claims this property, and the main question is, "Is he the person he represents himself to be." That is a question of personal identity. It is quite obvious that in order to make out his personal identity he must produce evidence shewing himself to be the person who landed in *New Zealand* from such a ship and in such a year. In order to do that he must call witnesses who can depose to his history since he landed in *New Zealand*, which will establish a chain of evidence connecting his identity with the person who landed at a particular point. I do not say that that will make out his case, but it will be essential evidence in the proof of his case. Now if I were to refuse to make an order in such a case as this the consequence

(1) 16 Ch. D. 100.

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would be not only that the Plaintiff himself must attend in *England* at the trial, but that he must bring with him those witnesses who can trace his history from the moment he landed in *New Zealand* about twenty-four years ago. I cannot possibly assume that he can by any means induce all the persons whose evidence he would like to have to come to *England*. But even if he could, and suppose the number to be not more than half-a-dozen, the expense of coming himself and bringing such a number of witnesses to *England* might be in fact an absolute denial of justice. Therefore it seems to me it is necessary "for the purposes of justice" that some such order as this should be made.

It was said that the order was wrong because it does not specify the names of the witnesses. But how can I force the Plaintiff to specify the names of the witnesses? What reason is there that I should? I never heard that before a trial of an action the plaintiff is bound to disclose the names of his witnesses to the defendant; on the contrary, it is every day practice at Nisi Prius and in this Court whenever witnesses have to be examined, that a man comes into Court and produces his witnesses, and if he likes he may keep their names a profound secret from every human being until they are in the witness-box. It is not the right of any party to an action to know the names of the witnesses at all, and therefore I do not think the order is bad on that ground. I think it might embarrass the Plaintiff if I were to compel him to name his witnesses, as I am quite sure that anybody who is collecting evidence for the purposes of a case like this would, very likely, not know until the last moment of a particular person who might be a very important witness, or would not be able to find him, and therefore would not be able to give a complete list of the witnesses whom he would like to call. I see no more reason for compelling the Plaintiff to give the names of the witnesses on the face of an order like this than I do in the case of an ordinary action where a man comes into Court and where it is the common practice not to disclose the names of the witnesses, and there is no obligation on him to do so. It seems to me, therefore, that such an order would operate with great unreasonableness and harshness in a case of this kind.

Then it was said that the order ought not to extend to the

Plaintiff himself. There is a great deal more in that. At the same time, unless I were to allow the Plaintiff to be examined in *New Zealand*, I should not be able to give him the advantage of himself giving that amount of evidence which would fit in with the evidence of other witnesses in *New Zealand*, and which would identify those witnesses as persons who were important in the chain of his evidence, and I should deprive the Plaintiff of the advantage of saying what may be very important to his case, viz., that "this man now standing up who is going to give evidence or has given evidence, is such and such a man, and I had these communications with him which I now describe," I should deprive the Plaintiff of that unless he should bring to *England* the man whom he would so identify by his own evidence before the examiner.

The Plaintiff should, I think, have the opportunity of giving testimony before the examiner in *New Zealand*, but I also think it quite right that there should be an addition to the order. I am empowered by the rule to impose such terms as I may think fit, and I think it is right that the order on the face of it should express this. It may be absolutely necessary, in resisting the Plaintiff's case, and in the defence of the Defendant, that the Defendant should have the Plaintiff himself in Court at the hearing, and be able to cross-examine him in the presence of persons who knew the real man in *England*, and who will be able to say "this is not the man." That is a thing which is obvious from the nature of the claim and defence, and therefore I think it is right to guard the order by some such terms as I have suggested, viz., that it be "without prejudice to the right of the Defendant to cross-examine the Plaintiff at the hearing of the cause in the presence of witnesses who will speak to his identity."

I do not understand rule 4 to mean that after an order of this kind has been made the discretion of the Court is taken away at the hearing of the cause. It may turn out that when the evidence in *New Zealand* has been given (given, of course, in the presence of some one on behalf of the Defendant, if he chooses, who can cross-examine the witnesses and test their evidence) the Defendant will be thoroughly satisfied that the Plaintiff is the man he represents himself to be, and will be inclined not to carry the litigation

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further. On the other hand, it may turn out that the Defendant is not satisfied, and that he may exercise the right of contesting the question at the hearing and when the evidence is put in he may point out that there are imperfections in it, and he may be able to make comments upon it which may induce the Court, before being satisfied of the identity, to require the presence not only of the Plaintiff but also of the *New Zealand* witnesses or some or one of them. It may be said that a witness may be produced in *New Zealand* who may state that he knew the man in *England* and lived with him there. On the other hand, it may be very important indeed to the Defendant that that witness should be confronted with his witnesses as they may say that he never lived there and did not know the man. That is an illustration which occurs to me. I apprehend the discretion of the Court is not taken away by the order. Suppose the Court made no limitation in an order under rule 4, and the Plaintiff and his witnesses were cross-examined in *New Zealand*, I apprehend the Court would be at liberty at the hearing of the cause, if the Defendant required the Plaintiff and his witnesses to be produced in *England*, to order them to be examined and cross-examined again before the Court, and if the Court were of that opinion surely there is nothing to interfere with the jurisdiction of the Court to order the trial to stand over or make any other order which the justice of the case may require. Looking, however, at the smallness of the property and the convenience to the Plaintiff of an order to take evidence in *New Zealand*, and the possibility of the evidence being sufficient to satisfy the Defendant, or at any rate to largely reduce the expenses which both parties would be at in proving the case if such an order were not made, it seems to me, in the language of the order, necessary for the "purposes of justice," that such an order, limited as I have said, should be made, but according to my understanding of the order, it will leave to the Court an unfettered discretion to deal at the hearing with such evidence as it likes.

T. F. M.

The order was accordingly varied by adding the following words: "This order is to be without prejudice to the right of

the Defendant to cross-examine the Plaintiff at the trial of the action in the presence of witnesses in *England*, who can speak to his identity." The Defendant appealed from the order as varied, and the appeal was heard on the 7th of November, 1883.

Maclean, for the appeal:—

The question here is as to the identity of the Plaintiff. There are old people in *England* who can say whether he is the person whom he alleges himself to be, and the case cannot be fairly tried without his coming here that he may be seen by persons who can speak to his identity. Leave therefore to examine him in *New Zealand* ought not to be given. The order suggests that he is to come here to be cross-examined, but it does not exclude his evidence if he does not come. If he is to come, what is the use of his being examined in *New Zealand?* There is no evidence that there is any practical impossibility of his coming here. The only suggestion made in the affidavit on his behalf is that his being examined in *New Zealand* will save expense. It is not necessary for the purposes of justice that he should be examined there unless it is shewn that he cannot come here: *Berdan* v. *Greenwood* (1); *Warner* v. *Mosses* (2). But I contend that the Rules of Court, 1875, Order XXXVII. r. 4, Rules of Supreme Court, 1883, Order XXXVII. r. 5, do not apply to a party to the cause. "Witness or person" does not generally apply to a party: *Storer* v. *Simmons* (3). I submit, therefore, that as regards the Plaintiff the order cannot be made. Then the order ought not to be a roving order enabling the Plaintiff to examine anybody. The witnesses ought to be specified.

Robinson, Q.C. and *A. C. Eddis*, contrá:—

[COTTON, L.J.:—We do not call upon you as to the jurisdiction to make the order for examining the Plaintiff in *New Zealand*.]

Then as to the general power to examine witnesses not named there is nothing requiring the order to be confined to persons named in it. The form 36, Appendix K. to the Rules of Supreme Court, 1883, is general; so is the form in *Seton* on Decrees, and

(1) 20 Ch. D. 764, n. (2) 16 Ch. D. 100.
(3) Weekly Notes, 1876, p. 40.

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London Bank of Mexico and South America v. *Hart* (1) supports the view that the witnesses need not all be named. We could not safely bring this case to trial without the power of examining any witness we can find. Now, as to the propriety of allowing the examination of the Plaintiff in *New Zealand*, the evidence taken there may be so complete and satisfactory that the Defendant will not further contest the Plaintiff's title. The Plaintiff therefore ought not to be compelled to come here at great expense when it may turn out that his oral cross-examination in *England* will be quite unnecessary.

[COTTON, L.J.:—It does not seem to me to be reasonable, in a case of this nature, that the evidence of the Plaintiff should be read if the Defendant wishes him to be orally examined. I am not much impressed by the argument that the Defendant may be satisfied with the evidence taken in *New Zealand*.]

The witnesses there will speak as to identity. How can it be shewn here that the Plaintiff is the person of whom they speak? It can hardly be supposed that the case will come on for trial without the Plaintiff being here, and if he does not come, then, under the order as it stands, his evidence cannot be read.

[LINDLEY, L.J.:—I am not sure that the order has that effect.]

If his depositions are excluded, unless he is here, no harm can be done to anybody by allowing him to be examined in *New Zealand*, and the truth will by that course be brought out more completely.

Cotton, L.J., then asked *Maclean* whether he would prefer having the name of the Plaintiff struck out of the order, or having a proviso inserted that his depositions should not be read unless he was produced at the trial if the Defendant desired it.

Maclean said he should be satisfied with the latter alternative.

COTTON, L.J.:—

This is an appeal from an order of Mr. Justice *Kay*, appointing examiners to examine in *New Zealand* the Plaintiff, two persons named in the order, and others. The material question

(1) Law Rep. 6 Eq. 467.

in the action is whether the Plaintiff is the person whom he alleges himself to be, and the principal dispute at present is as to the examination of the Plaintiff on his own behalf. Several objections have been taken to the order. The first is that Rules of Court, 1883, Order XXXVII., r. 5, does not enable the Court to direct the examination of parties to the suit. I think that this objection cannot prevail. It is true indeed that in considering whether justice requires an examination before special examiners, a party does not stand in the same position as a mere witness, as it may be very important that a party should be present to be examined at the trial when there is no necessity that a mere witness should be present. I have however no doubt that the Court has power under the rule to direct an examination of a party before a special examiner.

The order gives power to examine the Plaintiff, two persons who are named in it, "and others." Objection is taken to the words "and others." Now, no doubt, the Court will not direct a mere roving inquiry—the person who comes for an order of this kind must shew that there are material witnesses to be examined; but I see nothing to prevent the examination of persons other than those named. I think, however, that the order should be modified by requiring the Plaintiff to give to the other side in *New Zealand* ten days' notice of the names and addresses of the witnesses whom he proposes to examine.

The great contest, however, is as to the examination of the Plaintiff. The examination before a special examiner may be ordered if the Court considers it "necessary for the purposes of justice." No case is made that it is practically impossible for the Plaintiff to attend at the trial, and what we have to consider is whether under the circumstances of the particular case justice requires that he should be examined in this way. It appears to me that it is not consistent with the due administration of justice to allow the Plaintiff to give evidence in his own behalf without attending to be orally cross-examined. On his own shewing, he has been absent from *England* twenty-four years, and it is by no means an improbable supposition that he may be some person unconnected with the family, who having heard of this property, has come forward alleging himself to be the heir of the devisee.

C. A. 1883 NADIN v. BASSETT.

Justice requires that he should appear at the trial in order that his identity may be tested. I think, therefore, that the order must be qualified by inserting a proviso that the depositions of the Plaintiff are not to be read if the Defendant requires him to appear at the trial to be examined and cross-examined.

LINDLEY, L.J.:—

I am of the same opinion. I think that Mr. Justice *Kay* intended to secure the production of the Plaintiff for oral cross-examination at the trial if the Defendant requires it; but the order as drawn up, does not, as I understand it, effect this. I very much doubt whether the proviso contained in it would authorize the Judge at the trial to reject the Plaintiff's evidence, if he, being still out of the jurisdiction, did not appear to be cross-examined. It may be advantageous to both parties that the Plaintiff should be examined in *New Zealand*, but I think that his depositions ought not to be used unless he appears at the trial for examination if the Defendant desires it. The order cannot be taken as equivalent to an order to take evidence *de bene esse*, no materials having been brought forward to justify an order of that nature. Our order in fact comes to this, that the Plaintiff's depositions on his own behalf are not to be read without the consent of the Defendant.

Solicitors for Plaintiff: *Flux, Son, & Co.*
Solicitors for Defendant: *Ullithorne, Currey, & Villiers.*

H. C. J.

STEVENS *v.* BILLER.

C. A.
1883
CHITTY, J.
July 13.
C. A.
Nov. 7, 8.

[1882 S. 3868.]

Factor—Lien—Restrictions placed by Principal on Powers of Factor.

An agent who is entrusted with the possession of goods for the purpose of sale, does not lose his character of factor, or the right of lien attached to it, by reason of his acting under special instructions from his principal to sell the goods at a particular price and to sell in the principal's name.

MR. *JEROME SACCONE* carried on the business of a wine merchant at *Gibraltar*. Messrs. *Biller & Stevens* were his agents in *London* for the sale of wine, and he kept a current account with them. The business between them was regulated by a power of attorney dated the 29th of June, 1875, by which *Saccone* appointed *Biller & Stevens* his attorneys in *London* and all places throughout the world other than *Gibraltar*, with power for them in his name and on his behalf to transact and arrange all business relating to him in *London* and in all other countries throughout the world except *Gibraltar*, and to draw, accept, indorse, and negotiate all bills of exchange, promissory notes and cheques, and to ask, demand, and sue for all debts, and to give receipts and discharges by instruments under seal or otherwise, and to commence and prosecute any actions or other proceedings at law.

This power of attorney was revoked on the 3rd of May, 1883.

The present action was an action for taking the accounts of the partnership between *Biller & Stevens*, who had dissolved partnership, and a receiver had been appointed in the action.

The question for the decision of the Court arose as follows:—

Biller & Stevens dealt with *Saccone* in three ways:

1. Bottled wines were purchased by them from *Saccone* on nine months' credit, and sold and dealt with as the property of *Biller & Stevens*.

2. Wines were sent over in casks and purchased by *Biller & Stevens* on their own account, and dealt with as their own property.

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3. Wines were sent over in casks consigned to *Biller & Stevens*, and sold by them for *Saccone*, they receiving for their trouble a commission of £5 per cent.

The wines referred to in class 3 were only sold at the prices fixed by *Saccone*, which were advertised by him in his trade-circulars, and *Biller & Stevens* were not at liberty to depart from the prices set forth in the circular.

In the case of wines which had been consigned to them, *Biller & Stevens* usually sent the accounts in their own name if the customers resided in *England*, though in some cases it was stated in the accounts that they sold as agents for *Saccone*. In the case of foreign customers, *Saccone* used to send the account for the wine in his own name. But there was some conflict of evidence as to the course of business in this respect.

At the time when the power of attorney was revoked, there was a balance of about £200 due from *Saccone* to *Biller & Stevens* on their general account. There was a stock of wine in bond in the *London Docks* in the name of *Biller & Stevens*, which had been consigned to them by *Saccone*, and the receiver of the partnership claimed a lien on the wine for the sum due from *Saccone*.

Saccone and Sir *F. Perkins*, his attorney, took out a summons for the delivery of this wine to them.

The motion was heard before Mr. Justice *Chitty* on the 13th of July, 1883.

Crossley, Q.C., and *Solomon*, in support of the motion.

Ince, Q.C., and *Laing*, for the Plaintiff.

The following authorities were referred to:

Ex parte Dixon (1); *Whitfield* v. *Brand* (2); *Semenza* v. *Brinsley* (3); *In re Pavy's Patent Felted Fabric Company* (4); *Lickbarrow* v. *Mason* (5); *Kruger* v. *Wilcox* (6); *Smith's* Mercantile Law (7).

(1) 4 Ch. D. 133.
(2) 16 M. & W. 282.
(3) 18 C. B. (N.S.) 467.
(4) 1 Ch. D. 631.
(5) 6 East, 21.
(6) Amb. 252.
(7) 9th Ed. pp. 105, 114, 558.

CHITTY, J., after referring to other points in the case, said:—

There remains one question and one question only, that is with reference to certain wines now lying at the docks, standing in the names of *Biller & Stevens*, but belonging admittedly, so far as the property in the goods is concerned, to *Saccone*. *Biller & Stevens* were the consignees of the wine, and the bill of lading was made out to them and in their names. It is said it was not intended to pass the property in the goods, and no doubt the property in them was reserved to *Saccone;* but the facts that I have mentioned shew that the goods in question are, so far as the legal right to obtain possession of them is concerned, in the possession of the Defendant.

The question is whether the relation which has thus been severed between Messrs. *Biller & Stevens* and *Saccone*, was such a relation as entitled *Biller & Stevens* to set up a lien on these goods with reference to the debt of £137, and the acceptance for £325.

Saccone's case is that *Biller & Stevens* had no right to sell his goods or his wine except in his name, and in support of that proposition the power of attorney before mentioned, which was given so long ago as 1875, and which has recently been revoked, is referred to. That power of attorney appointed *Biller & Stevens* the attorneys and agents of *Saccone* for the affairs and property of *Saccone* in *London*, and all places in fact throughout the world, except *Gibraltar*, under the powers mentioned, enabling the partners in *Saccone's* name to transact business in all parts of the world except *Gibraltar*. Everything which is to be done is to be done in the name of *Saccone*.

The parties are in conflict as to what the course of business was, not merely with regard to the power of attorney, but with regard also to the general transaction of *Saccone's* business. The wine which is now in the docks is undoubtedly wine of the third class, mentioned in the 5th paragraph of *Biller's* affidavit; it is not part of the wines which were purchased by *Biller & Stevens* from *Saccone*.

Now, undoubtedly, *Biller & Stevens* have the possession of this wine. There is no express contract proved between the parties that they should have a lien, but there is some evidence

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with reference to the terms upon which *Saccone* drew. There was a general account kept, and it is said by Mr. *Biller*, who now takes the part of *Saccone*, that the drawing was on their general account current, and on no other account, and if that was so simply, of course there would be no lien, and it would be a mere debt. But *Biller & Stevens* had the goods consigned to them for sale, and then arises the question whether they did as a fact sell the wines in their own names or in the name of *Saccone*.

Now, *Biller* says the wines were sold in *Saccone's* name; but upon the affidavit and documents the wines were sold in the names of *Biller & Stevens*. In those circumstances, there being no express contract, what is the relation really between the parties? If it is a case of mere agency and nothing else, it is quite plain that *Biller & Stevens* have no lien on the goods for the debt. If, however, it is a case not of mere agency, but of that kind of agency which is called "factorage," then *Biller & Stevens* have a lien.

I will refer to a well known book on the subject for the purpose of shewing what the position of a factor is. Mr. *Smith* in his work on Mercantile Law, says (1): "There are two extensive classes of mercantile agents, namely, factors who are entrusted with the possession as well as the disposal of property, and brokers, who are employed to contract about it, without being put in possession," and he also states elsewhere, what is of course a simple proposition of law, that a factor has and an agent has not a lien on goods. In *Ex parte Dixon* (2) Lord Justice *Brett*, having the question before him with reference to what was a factor, states at page 137 of the report the definition which I have just read as the one which he thought and considered to be law, and then he goes on to deal with the question where the factor is selling in his own name, and without reading his observations at length it appears to me that he lays down the law thus, that although a factor in the usual course of business sells in his own name, yet he is not necessarily less a factor, because he sells in the name of his principal. The observation from which I draw that inference is this (3), "That being so, the very

(1) 9th Ed. p. 106. (2) 4 Ch. D. 133.
(3) 4 Ch. D. 137.

fact of entrusting your goods to a man as a factor, with right to sell them, is *primâ facie* authority from you to him to sell in his own name." Then he afterwards refers to the judgment of Mr. Justice *Willes* on the subject in *Semenza* v. *Brinsley* (1), and he seems to me to treat the law in the manner in which I have endeavoured to express it, namely, that a man is not the less a factor because he has private instructions not to sell in his own name. In other words, there may be a factor who as between himself and his principal is not justified in selling except in his principal's name. In the case of *Whitfield* v. *Brand* (2), which has been referred to, Chief Baron *Pollock* says at page 288 of the report, "As soon as it appears to be a branch of a party's business to sell the goods of others on commission, that establishes him to be a factor." That of course is not intended to be exhaustive, but the learned Chief Baron plainly had the point present to his mind, and he states that the factor must have the possession of the goods—the control of the goods; but at all events the Judges in that case held, as I read the proposition laid down by them, that the circumstance that a man has goods in his possession for the purpose of sale on commission constitutes him a factor.

Now what are the facts here? I think it was at least an open question between these parties whether after the power of attorney was given it was competent to *Biller & Stevens* to sell otherwise than in the name of *Saccone*. On the facts it appears to me that they have departed from that course of business, though I will assume in favour of *Saccone* that the sales ought to have been made in his name. I ought, however, to make this observation, that though *Biller*, who makes the affidavit on the part of *Saccone*, says now that the sales were always made in the name of *Saccone*, it appears from the entries to which my attention has been called in the books that he sold the wines of *Saccone* of the class which I have been dealing with in the name of *Biller & Stevens*, so that as between that firm and the customer the firm could have recovered the payment. It also appears that the bills, as far as I can make out, were made out in the names of

(1) 18 C. B. (N.S.) 467. (2) 16 M. & W. 282.

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the firm of *Biller & Stevens*, and it appears to me on these facts that there was possession of the goods on the part of *Biller & Stevens*, and that they had the right to sell them as between themselves and *Saccone*, and that they had the disposal of the property.

It is immaterial what are the restrictions that are imposed on the factor by the principal with regard to the disposal. They had the disposal of the goods to my mind within the definition as given in Mr. *Smith's* work on Mercantile Law. No doubt they had not an absolute discretion as to the price, as Mr. *Crossley* has pointed out, to be obtained for the goods. There seems also to have been a separate price list used which was sometimes used as a separate document, and in some of the price lists issued by *Biller & Stevens* the separate document appears to have been incorporated and to have formed part.

Now, under these circumstances, I think that *Biller & Stevens* have been shewn to be factors, that it has been shewn on the part of the applicant that *Biller & Stevens* stood in the position of factors for the purpose of selling this wine.

It would be a very extraordinary result, and I am sure it would surprise mercantile men, to find that where there is a foreign principal whose goods are sent to *England*, and who is drawing on an open current account between himself and an agent here, and also drawing bills on that agent, that where the agent here had been advancing money (for that is the case) he had no claim against the goods consigned by the foreign principal. It is said on the part of the firm now that they looked to the proceeds of the sale of the wines for their reimbursement for moneys advanced, the sales being according to the course of business, and I think they are right in this. The sales having in fact been made in the names of *Biller & Stevens* they would, had not the agency been suddenly determined, have received the proceeds of the wines standing in the books, and in that way they would have been able to reimburse themselves.

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From this judgment *Saccone* and *Perkins* appealed. The appeal came on for hearing on the 7th of November, 1883.

Crossley, Q.C., and *Solomon*, for the Appellants :—

Biller & Stevens claim a lien upon the wine in the character of factors; but they were not factors. They were simply agents, and their agency was regulated by the special terms of the power of attorney. A factor has the full control of the goods consigned to him, and sells them in his own name for what price he thinks right; but *Biller & Stevens* had no such control over these wines. They were bound to sell at the price fixed by *Saccone*, and they were directed by the terms of the power of attorney to sell in his name. A factor's lien exists by custom, and when there is a special contract the custom is excluded: *Baring* v. *Corrie* (1); *Smith's* Mercantile Law (2).

Ince, Q.C., and *Laing*, for the Plaintiff, were not called on.

COTTON, L.J.:—

This is an appeal from a judgment of Mr. Justice *Chitty* on a summons which raised the question whether Messrs. *Biller & Stevens* were factors, and whether as such they were entitled to a general lien on goods entrusted to them by *Saccone*, their principal, while in their possession. The learned Judge decided that they had a general lien on the goods entrusted to them, and an appeal is brought from this decision.

The question is put by the Appellants in this way: it is said that *Biller & Stevens* were not factors but only agents of *Saccone*. A factor is an agent, but an agent of a particular kind. He is an agent entrusted with the possession of goods for the purpose of sale. That is the true definition of a factor. In the present case certain wine had been consigned by *Saccone* to *Biller & Stevens* and still stands in their names in the bonded warehouse. It is therefore in their possession; but it is contended that it is in their possession as agents, but not as agents of the class called factors.

It is said that there are various circumstances in this case which prevent *Biller & Stevens* from being treated as factors. In the first place it is contended that they were restricted as to

(1) 2 B. & A. 137. (2) 9th Ed. pp. 106, 153.

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the price at which they were to sell the wines. That is true. The prices are fixed by *Saccone*, and as between him and them they were bound to sell the wines at those prices. But no cases have been cited to shew that where an agent is bound to sell at a fixed price that prevents him from being a factor and claiming a factor's lien. I see no reason for such a contention; the factor is entrusted with the possession of the goods for the purpose of sale, and the fact that the price is fixed by the principal can make no difference as to his character of factor. Then it is said that *Biller & Stevens* were bound to sell in *Saccone's* name and not in their own, and the power of attorney is produced to shew that this was the case. But when we look at the power it is clear that its object was to authorize them to do things which they could not have power to do as mere factors. It was to give them additional powers and not to restrict the powers which they had as factors. There is nothing in the power of attorney to shew that they might not sell in their own name as well as in *Saccone's*. But if this was intended as a restriction, I do not think it would prevent them from having the lien which a factor is entitled to.

A factor can sell in his own name as against his principal whatever restriction there may be in his instructions. It is not essential for the purpose of giving him a general lien that he should be free from any restriction as to the name in which he shall sell the goods. No cases were cited before us for such a proposition, and a case was cited before Mr. Justice *Chitty* to the contrary: *Ex parte Dixon* (1). That case shews that if a factor sells in his own name, although contrary to the instructions of his principal, it will give a right of set-off as between the purchaser and the factor; it will not take away his character of factor. Then it was argued that *Biller & Stevens* had not the control of the goods; I think they had, and except in the matter of the price they had full power of disposal of the goods in accordance with their trust for sale. On the whole, therefore, I think that there is nothing in the circumstances of this case to prevent *Biller & Stevens* from having their lien as factors, and that the appeal must be dismissed with costs.

(1) 4 Ch. D. 133.

LINDLEY, L.J. :—

I am of the same opinion. Suppose there had been no power of attorney in this case. As against *Saccone* and third parties, *Biller & Stevens* would be what are commonly called factors, and would be entitled to a general lien as such. Of this there can be no doubt. But it is said that the power of attorney alters their position. We must therefore look at the power of attorney to see if there is anything expressed or implied in it to restrict any power which they would otherwise have had. It is obvious that the power of attorney was not intended to restrict their powers as factors, but to enlarge them. It makes *Biller & Stevens, Saccone's* general agents for all the world except *Gibraltar*, and gives them power to accept bills and bring actions in his name. Its object was, therefore to give them powers which they would not have had as ordinary factors, not to restrict their powers. But even if its effect were to restrict their powers, I agree with Lord Justice *Cotton* that it would make no difference as to their lien as factors.

I therefore agree that this appeal must be dismissed with costs.

Solicitors: *C. A. Wright; J. Keily.*

M. W.

BENTHALL *v.* EARL OF KILMOREY.

[1883 B. 2751.]

Charity—Action by Resident Medical Officer—Recipient of Funds of Charity—Consent of Charity Commissioners—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 17 [*Revised Ed. Statutes, vol. xi. p.* 986].

The Plaintiff had been appointed in pursuance of certain rules framed by the committee of a hospital established by a trust deed of March, 1879, under the powers conferred by the deed, resident medical superintendent of the institution for life, subject to his removal on three months' notice by the committee on proof to them of neglect of duty; and he was let into possession of a house which was annexed to the office. The funds of the hospital not being sufficient to maintain a resident medical officer, the committee gave the Plaintiff three months' notice of removal, no charge of neglect of duty being brought against him. The committee gave the notice with the intention of applying for a new scheme which would render the office unnecessary.

The Plaintiff commenced an action against the committee for a declaration that he was entitled to hold his office during good behaviour, and for

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an injunction to restrain them from ejecting him from his residence and from otherwise interfering with the tenure of his office :—

Held, by *Chitty*, J., on motion for an injunction, that the Plaintiff before issuing his writ ought to have obtained the certificate of the Charity Commissioners as required by sect. 17 of the *Charitable Trusts Act*, 1853, and the motion was refused with costs.

Held, by the Court of Appeal, that if the object of the action was anything beyond preventing the Defendants from excluding the Plaintiff, it required the sanction of the Commissioners. And the Defendants at the Bar expressing their intention not to exclude the Plaintiff unless and until a new scheme should be sanctioned, or until the trial of the action, the order of the Court below was affirmed.

ST. JOHN'S HOSPITAL, Twickenham, was established by a certain trust deed dated the 5th of March, 1879, which deed provided that the institution, its property, and finances should be under the sole management and control of the committee consisting in the first instance of the persons therein named, with power to add to their number and to vary and fill up vacancies, and that such rules and regulations as might from time to time receive the sanction of the committee should be the rules and regulations of the institution, and that the committee should have power to appoint amongst other officials the medical staff of the institution, which was to include a resident medical superintendent.

By the 38th clause of the rules prepared by the committee in exercise of the above power the medical staff was to consist, among others, of a resident medical superintendent to be appointed for life, "but the executive council shall have the power of removing him by written notice of three months and declaring the office vacant on proof satisfactory to them of neglect of duty in the work of the hospital."

The Plaintiff was in 1879 appointed by the then committee under the above rule resident medical superintendent of the institution, and was let into possession of a house which was annexed to the office.

The Defendants, who were the present committee of the institution, having lately come to the determination that the funds of the hospital were not sufficient to maintain a resident medical superintendent, had given the Plaintiff three months' notice of removal. There was no charge against the Plaintiff of neglect of duty or otherwise.

On the 11th of May, 1883, the solicitors of the Defendants wrote to the solicitors of the Plaintiff a letter which contained the following statement:—

"The notice was intended as a formal intimation to Dr. *Benthall* of the conclusion to which the committee had arrived, that the hospital cannot longer be carried on under the present scheme, and that it is absolutely necessary from the state of the finances, as well as for other reasons, to put an end to the system under which the work of the hospital is at present conducted, and to apply to the Charity Commissioners for a new scheme (as the committee are about to do), and that the functions of the resident superintendent will under the circumstances necessarily cease."

The Plaintiff thereupon commenced this action against the committee, and claimed by his writ a declaration that he was entitled to hold his office during good behaviour, and an injunction to restrain the Defendants from disturbing him in his office and from ejecting him from his residence in the hospital, and from closing the list of provident members and suspending the work of the hospital and from otherwise interfering with the tenure of his office.

The Plaintiff moved before Mr. Justice *Chitty*, on the 20th of July, 1883, for an injunction in the above terms.

Ince, Q.C., and *Spokes*, in support of the motion.

Macnaghten, Q.C., and *Vaughan Hawkins*, for the Defendants, raised the preliminary objection that the Plaintiff had not before issuing his writ obtained the certificate of the Charity Commissioners as required by sect. 17 of the *Charitable Trusts Act*, 1853, and relied on an unreported case of *Brittain* v. *Overton* (1),

(1) Jessel, M.R. March 19, 1877.

BRITTAIN *v.* OVERTON.

THE Plaintiff in this case was a schoolmaster of the Free School of *Cottingham*, near *Hull*, and the Defendants were the three trustees of a charity known as *Mark Kirby's Charity*, who had been appointed under a scheme of the Court of Chancery made in 1874.

The Plaintiff by his claim alleged that he had been appointed such schoolmaster somewhere prior to October, 1872, by the churchwardens and overseers of the parish of *Cottingham*, in whom the appointment was vested, and that the then trustees of the

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decided by the late Master of the Rolls on the 19th of March, 1877.

Ince, Q.C., in reply, contended that the certificate of the Charity

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charity agreed that he should receive the whole net income of the charity fund and any surplus funds in consideration of his teaching ten additional free scholars, whom he further alleged that he duly taught.

The Plaintiff then alleged that the Defendants refused to pay him, alleging untruly that they had dismissed him from his office, and having further alleged that the Defendants had funds in their hands applicable to the payment of his income, he claimed that an account might be taken of all moneys received by the trustees of the charity since the 12th of September, 1857, or then in the hands of the Defendants as such trustees, and of all payments and disbursements by them made out of the moneys so received by them, and that the Defendants (as trustees) might be ordered in execution of the trusts of *Mark Kirby's* will to pay to him the surplus of the rents and profits of the charity land.

To this statement of claim the Defendants demurred on the ground that the Plaintiff had not prior to commencing his action obtained the certificate of the Charity Commissioners, as required by the 17th section of the *Charitable Trusts Act*, 1853.

Vaughan Hawkins, in support of the demurrer.

Chitty, Q.C., and *Walter Kingsford*, for the Plaintiff.

JESSEL, M.R., after stating the facts as above set out, continued as follows:—

This, in my opinion, is clearly a suit within the meaning of the 17th section of the Act. It is clearly a suit which could only have been brought in the old Court of Chancery if the *Judicature Act* had not been passed. It is an account against trustees for their receipts and for all proper allowances, and it is a claim that the Defendants as trustees may be ordered to pay in execution of the trusts of *Mark Kirby's* will. It is clear it must have been an Equity suit, and as regards the claim by contract, that is, the claim alleged to be by contract with the former trustees, and not inferentially with the present trustees, and which is to be carried out pursuant to the trusts of *Mark Kirby's* will; it is not a contract to be enforced by reason of the present trustees having personally made it. It does not appear that they did make it, but whether they did or not does not matter. In every respect it is an Equity suit, and if it is an Equity suit the 17th section says: "Before any suit, petition, or other proceeding (not being an application in any suit or matter actually pending) for obtaining any relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof, shall be commenced," you shall have the order of the Charity Commissioners.

Then the proviso is this: "Provided always, that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity." Now the words there are noticeable (I have commented on them very lately in a case which is now subject to an appeal).

Commissioners was not necessary, and referred to *Holme* v. *Guy* (1).

CHITTY, J.:—

The objection to this motion is that the writ has been issued without the certificate of the Charity Commissioners. The writ asks for a declaration that the Plaintiff is entitled to hold the office of medical resident officer of *St. John's Hospital, Twickenham*, and then claims an injunction to restrain the Defendants from disturbing the Plaintiff in his said office, and from otherwise

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"Such petition or proceeding in which any person shall claim any property or seek any relief." That obviously refers to a case in which, pending a Chancery suit, you might by petition, which was the proper mode, claim *pro interesse suo*, or where you might take a proceeding in Equity where you could not bring an action at Law. For instance, the legal estate might be outstanding, or you might claim money by suit in Equity, on the ground that it was the proceeds of land not well given to the charity.

Those things are the subjects of relief adversely to the charity, that is, you do not claim under the charity trusts, alleging that the claim is for property not affected by the charity trusts. That is what I understand by claiming adversely to the charity.

But in this case the claimant is one of the objects of the charity. He says a certain benefit is given to him by *Mark Kirby's* will, and under the trusts of that will in the subsequent events he is entitled to a certain income as being one of the officers of the charity, and an object thereof.

It is quite true that he was appointed by persons other than the governors, but he says that makes no difference.

We are all familiar with the instances in which the officers or recipients of charities are not appointed by the governors of the charity. Take the case of the chaplain of a hospital appointed by the bishop of the diocese, or the exhibitioner of a school appointed by the master or the fellows of a college who have some voice in the management of the school. The form of these appointments when the appointees are once appointed does not make them less the objects of the charity. In very many charities almsmen and almswomen are appointed by persons who are neither trustees nor governors of the charity. In some cases there is a right of appointment in persons who have no connection with the object of the charity though they have with the fund.

This case, however, is merely that of a man claiming to be a recipient of part of the proceeds of a charity asking the Court to administer the trusts of the charity for the purpose of getting the benefit of the charity.

It seems exactly within the provisions of the 17th section of the Act, and therefore I allow the demurrer.

Solicitors: *W. Eley*; *Chester & Urquhart*.

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(1) 5 Ch. D. 901.

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interfering with him in the execution of his office. It proceeds also to ask for damages for the wrongful dismissal of the Plaintiff and for breach of the terms of the agreement between himself and the Defendants.

The order now asked for is only for the injunction according to the terms of the writ. It is admitted, and if not admitted it is clear, that the Plaintiff cannot maintain his action against the present Defendants on any contract of appointment. They are not the parties who appointed him, and therefore are not the parties to be sued in reference to wrongful dismissal. If it was any question between the person employed and the employers, according to the well known decisions of this Court in cases of the kind, the Court would not interfere by way of injunction. To grant an injunction in such a case would be to enforce specifically a contract for personal service. I mention that to shew that the motion cannot be considered to be in any sense founded on contract.

Now, the Plaintiff's case is that he is under the charity deed entitled to reside in a house as medical officer, he having been duly appointed by the committee pursuant to the deed by which the charity was founded, and to the rules and regulations relating to the same. There is no question that he has been properly appointed, and that according to the regulation under which he was appointed, he was not to be dismissed except in certain events which have not occurred. So far as the case is presented to me, it would seem that there was no ground for dismissing him, because the case contemplated had not occurred. I have not heard the case out on the merits, because I think the preliminary objection which has been taken is fatal.

The Plaintiff claims to be an object of the charity, and he is claiming part of the charity estate as beneficially belonging to him for life, together with the endowments which belong to the office, which he says is a freehold office, but his whole claim is to a part of the charity estate. It is not an adverse litigation in the sense of the illustrations which have often been given of these matters, it is not a case where the trustees of a charity are suing the tenant to recover possession of the land when the tenancy has expired, nor is it the case of a person who is claiming land

adversely to the charity saying that the land forms no part of the charity estate; but it is, to use a term which has been applied in a somewhat analogous matter, an "internal" claim—it is a claim to share in the benefits of the charity as one of the recipients of it.

It appears to me that this case falls entirely within the principle which the late Master of the Rolls laid down in the case of *Brittain* v. *Overton* (1). The claim in that writ differed in some, but to my mind immaterial, respects from the one which is before me; that case was one of a schoolmaster, and in order to get the sum which he said was properly payable to him out of the charity estate, he asked for an account of charity income and the like, and clearly (putting aside the rest of the case) that alone was quite sufficient to bring him within the scope of the proviso at the end of the 17th section. But here I have a claim on the part of the Plaintiff which would lead to an interference with the charity estate itself, and accounts and inquiries might have to be taken involving the administration of the charity estate; because not only does the Plaintiff seek special relief with regard to his residence in his office, but as incidental to that relief he asks that the list of provident members of the hospital may not be closed, which would be a direct interference with the administration of the charity estate.

Now I will make an observation on the case of *Holme* v. *Guy* (2). The case came on afterwards before the late Master of the Rolls on the trial, and the plaintiffs did not succeed because it was shewn that they had not duly summoned the master, who was the defendant, and consequently had no right to turn him out. The case was somewhat analogous to the very numerous cases which occurred before the late Master of the Rolls of clubs and the like; and the defendant, notwithstanding that he failed on the demurrer on the point now in question, did in fact succeed at the trial on the ground which I have mentioned. The case therefore shews that the trustees can bring an action for recovery of possession of the schoolhouse, or a residence such as this is, without leave of the Charity Commissioners, and the result of the case of *Holme* v. *Guy* (speaking of it according to what took

(1) *Ante*, p. 41. (2) 5 Ch. D. 901.

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place at the trial) shews that the Defendant in a case of this kind is entitled without of course getting any leave from the Charity Commissioners, to defend himself as best he may against the claim. If the trustees should be advised to take any proceedings it would be still open to the present Plaintiff to make the best defence he can on that point, without of course claiming anything as damages.

I think I ought not to part with the case without saying this. It appears according to the evidence that the managers of this charity can no longer carry it on upon its present footing, and therefore it was that they took the course of giving three months' notice to the Plaintiff. They cannot carry it on, on the present footing, as they say, for want of funds, and they say their intention is to apply, and they have since applied, to the Charity Commissioners, for a new scheme. No doubt the Charity Commissioners, if they should refuse any application the Plaintiff may be advised to make to them for leave to institute a new suit, will, in sanctioning any new scheme, take into consideration and give due weight to whatever claims the Plaintiff may have.

The result is, that I must refuse this motion, with costs.

G. M.

C. A.

From this decision the Plaintiff appealed. The appeal was heard on the 8th of November, 1883.

Ince, Q.C., and *Spokes*, for the Appellant.

Macnaghten, Q.C., and *Vaughan Hawkins*, for the Defendants.

In the course of the argument,

Macnaghten, Q.C., said that his clients adhered to the expressions contained in the letter of the 11th of May, 1883, and that they had no intention of disturbing the Plaintiff in the occupation of his house unless and until a new scheme was settled by the Charity Commissioners, or until the trial of the action.

COTTON, L.J.:—

Mr. *Macnaghten* has now stated, in accordance with the real effect of the letter of the 11th of May, that the Defendants have

no intention of turning the Plaintiff out of his house unless and until a new scheme is settled by the Commissioners, or until the trial of the action. That being so, I think it right to make no order on this appeal, except that the costs of the appeal will be costs in the action, and that the Appellant is to have liberty to apply as he may be advised. I think that this statement renders it improper for the Court to grant an injunction in this case. I do not say that, even if the statement had not been made, the Court would have granted an injunction, because the Plaintiff might have raised his defence in an action of ejectment if brought against him by the Defendants. If this action was brought with any other object beyond preventing the Defendants from excluding the Plaintiff from his office and house, I think it clearly required the sanction of the Charity Commissioners. We have not heard Mr. *Macnaghten's* argument on the question whether the sanction of the Commissioners would be equally required if the action was simply intended to prevent the Defendants from excluding the Plaintiff. Therefore, on that point I give no opinion. But as the matter now stands I think that the order for an injunction would be unneccessary and improper.

LINDLEY, L.J.:—

I am of the same opinion.

Solicitors: *Howard Rumney; Beachcroft & Thompson.*

M. W.

C. A.
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Nov. 14.

TAYLOR *v.* MOSTYN.

[1881 T. 77.]

Practice—Foreclosure Decree—Right of Defendants to insist on Plaintiffs bringing in Accounts—Amendment of Form of Summons.

Mortgagees for a term of a colliery brought an action for foreclosure, seeking declarations that the original mortgage deed was a good exercise of a power of leasing, and that the sums secured by a later deed were also charged on the term created by the first deed. They obtained a decree giving them the declarations asked, and directing the usual accounts in the case of mortgagees in possession, with directions for foreclosure in default of payment. A summons was taken out by the Defendants to proceed with the judgment, and the chief clerk directed the Plaintiffs to bring in their accounts by a certain day, but no order to that effect was drawn up. The Plaintiffs afterwards having refused to bring in their accounts on the ground that, as they alleged, the moneys remaining due to them were many times more than the value of the mortgaged property, and that taking the accounts would therefore be useless, the Defendants applied on summons for an order that the Plaintiffs might bring them in in four days, not asking any alternative relief. *Pearson*, J., refused the application on the ground that the Defendants were not entitled to a four-day order. The Defendants appealed:—

Held, that the summons must be treated as if it had been asked that the Plaintiffs might bring in their accounts in four days, or in such other time as the Court might think fit, the summons if necessary, being amended:—

Held, that as the Plaintiffs had taken a foreclosure decree, the Defendants were entitled to have the accounts brought in, but that the order should be prefaced with a statement that they required them to be brought in.

Whether this statement would give the Court jurisdiction as to the costs if it turned out that the accounts had been asked for vexatiously and unreasonably, *quære*.

Whether the Court would not on a substantive application by the Plaintiffs stay the taking the accounts if it was satisfactorily shewn that taking them would be useless, *quære*.

THE Plaintiffs in this case were mortgagees of certain colliery property forming part of the *Mostyn* estate, and brought their action for foreclosure. On the 16th of May, 1882, judgment was given, declaring that an indenture of the 8th of December, 1843, created a valid lease of the mines therein comprised, and that the

term thereby created was subject to the payment not only of the moneys purporting to be secured by that deed, but also of all moneys due on the security of an indenture of mortgage of the 26th of April, 1850, and directing an account of what was due to the mortgagees, and an account of rents and profits received by them and their predecessors in title as mortgagees in possession, with consequent directions for redemption or foreclosure. The Defendants, the trustees of the *Mostyn* estate, appealed, seeking to discharge the above declarations, and to have it declared that the deed of 1843 did not create any valid lease, or that if it did the lease would terminate on the death of Lord *Mostyn*, and that the term was liable only to the moneys secured by the deed of 1843, and not to the further sums secured by the deed of 1850.

On the 9th of May, 1883, the appeal was dismissed, and at the same time an appeal by the present Plaintiffs from a decree in a suit of *Mostyn* v. *Lancaster*, which restrained them from getting a considerable part of the coal remaining ungotten, and was made at the same time with the decree in this suit, was dismissed (1).

On the 1st of August, 1882, a summons had been issued by the Plaintiffs to proceed with the judgment, and on the 4th of August the Chief Clerk directed them to bring in their evidence and accounts by the 1st of November, 1882, but no order to that effect was drawn up.

The appeal having intervened, nothing was done as to the accounts, but after the dismissal of the appeal the Defendants' solicitors, on the 18th of July, 1883, wrote to the Plaintiffs' solicitors asking that the accounts might be brought in. The Plaintiffs' solicitors replied on the 1st of August that they had not received any instructions to carry in the accounts, and did not think that the Plaintiffs had any immediate intention of doing so. The Defendants' solicitors wrote back to say that they had issued a summons requiring the accounts to be left, with a view of having a period within which it should be done fixed by the Chief Clerk. This summons was that the Plaintiffs might be ordered "within four days after service" to lodge the accounts in Chambers.

(1) 23 Ch. D. 583.

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On the 5th of September, 1883, Mr. Justice *Pearson*, sitting as vacation Judge, dismissed the summons with costs, on the ground, as was stated, that it only asked for a four-day order, to which the Defendants were not entitled, as no order had ever been drawn up directing the Plaintiffs to bring the accounts in by any particular day.

The Defendants appealed, asking that this order might be discharged, and that the Plaintiffs might be ordered to leave the accounts in Chambers within such time as the Court should deem reasonable. The appeal was heard on the 14th of November.

The Plaintiffs in their evidence stated their belief that there was due on their securities many times the value of the mortgaged property. The Defendants disputed this, and alleged it to be probable that the property might be worth redeeming.

Davey, Q.C., and *Sir A. T. Watson*, having opened the case were stopped by the Court.

Marten, Q.C., and *Finch*, *contrà*:—

The summons asked for a four-day order, to which the Defendants were not entitled, as no order for the delivery of accounts had been served on them, and Mr. Justice *Pearson* dismissed the summons on that ground.

[COTTON, L.J.:—That is too strict, we must deal with the summons as if it had asked for delivery within four days or such other time as the Court should think reasonable. The Court has ample power to amend the summons.]

Then we say that the Plaintiffs ought not to be ordered to bring in their accounts at all. It will be a serious expense to bring in accounts of a colliery of which they have been in possession for so many years, and they ought not to be ordered to do so when it is clear that the Defendants will not redeem. The great object of the action was to obtain declarations that the mortgage was a good exercise of the leasing power, and that the term created by it was a security for all the mortgage debts. Those declarations we obtained, and we are content to let the matter remain there. There is no authority which says that a mortgagee is bound to go on with a foreclosure decree. The Defendants

if they wish to be active ought to be put in the same position as if they were bringing a suit to redeem. Either it should be stated in the order if made that the accounts are brought in at the request of the Defendants, and the costs of taking them should be reserved, or an order should be made, similar in effect to that in a redemption suit, dismissing the summons with costs if the Defendants do not redeem.

Davey, in reply :—

[COTTON, L.J.:—Ought it not to be stated in the order that the accounts are brought in at your request? That may give the Court jurisdiction as to costs if it turns out that they were unreasonably asked for.]

No. The question whether a foreclosure decree should be taken was for the consideration of the Plaintiffs at the trial. They knew that the result of *Mostyn* v. *Lancaster* was to make their security less valuable than they supposed it to be, and to lessen the probability of redemption, but they chose to take a decree for foreclosure. The Court, then, cannot impose terms: when a decree for account has been made each party has a right to have it prosecuted, and it is quite a new thing to impose terms upon a party seeking to prosecute it. In *Jennings* v. *Jordan* (1), where a mortgagee had claimed to consolidate mortgages, and was held entitled to consolidate some, but not all, and the decree was drawn up on the footing of consolidating those which he was held entitled to consolidate, he was not allowed after decree to withdraw from his election to consolidate. So here, the Plaintiffs having elected to take a decree for foreclosure cannot withdraw from it and say that they do not wish to foreclose. It is not improbable that they may be redeemed, for the decision in *Mostyn* v. *Lancaster* makes the property worth more to us than to them.

COTTON, L.J.:—

This is an appeal of a somewhat novel character. A foreclosure decree had been obtained by the Plaintiffs in May, 1882, and in August in that year a direction was given to the Plaintiffs

(1) 6 App. Cas. 698.

C. A. 1883 TAYLOR v. MOSTYN. Cotton, L.J.

in Chambers to bring in their accounts. An appeal from the decree was pending till the 9th of May, 1883, and nothing was done under the decree. In August, 1883, the Defendants, the owners of the equity of redemption, applied to Mr. Justice *Pearson* that the Plaintiffs might, within four days, carry in their accounts. Mr. Justice *Pearson* dismissed the summons on the ground, as we understand, that the Defendants were not entitled to the four-day order, and had not asked for anything else. We think that this was too strict a mode of dealing with the matter, and that the summons ought to be considered as amended so as to ask that the Plaintiffs may be ordered within four days, or within such other time as the Court may think fit, to carry in the accounts directed by the decree.

Then comes the question whether any order at all to carry in the accounts ought to be made. The Plaintiffs say, "We have discovered that in consequence of the decision in *Mostyn* v. *Lancaster* the estate must necessarily be worth very much less than the amount due to us, and therefore we decline to go on with the accounts directed by the decree, because we shall only be incurring useless expense. If the Defendants were to redeem they would have to pay the costs of those accounts as well as the debt, but as it is certain that they will not redeem, the taking the accounts will only throw extra expense on us." The other side dispute that and say, "We do not consider your view of the accounts to be correct, and we desire them to be prosecuted." The question then really is whether the Court ought to impose upon the parties applying any terms as regards the cost of taking the accounts if an order is made directing the Plaintiffs to carry them in.

It was open to the Plaintiffs when they knew what the decisions were to consider whether they would or would not take a foreclosure decree. They might have abandoned it, but they have taken it, and I think that, as the decree now stands, Mr. *Davey* is right in saying that he can insist on the Plaintiffs carrying in those accounts which they must carry in in order that the accounts directed by the decree may be taken. But I think our order directing the accounts to be brought in should shew that it is made at the instance and at the request of the Defendants,

who insist that the accounts shall be taken. I in no way decide that, even then, if it turns out that it is hopeless to think of redemption, and that the insisting on having the accounts taken was useless and reckless, the Court will have jurisdiction to order the Defendants to pay the costs. That question must be left open till the time comes; but in such a case, if the Court has power to do it, it would be reasonable to order the Defendants to pay the costs. If, however, there is a reasonable ground for calling for these accounts, I do not see why, when the Plaintiffs have taken a decree in this form, the Defendants should pay the costs of taking the accounts though the result may be such that redemption is out of the question. I think the proper order will be this. The Defendants desiring and insisting that the accounts mentioned in and directed by the decree should be taken, order the Plaintiffs within a time to be named in the order to bring in their accounts. If the fact that the Defendants insist on the accounts being taken does enable the Court to make them pay the costs in case it should appear on the accounts that the requiring them to be taken was reckless, that question will arise upon the form of the order we make.

There is a further point to be considered. It may be thought that on a proper case being made, and the Court being satisfied that the taking of the accounts would be a mere waste of money, and that it is reckless on the part of the Defendants to insist upon it (of which there is no evidence to satisfy us now), the Court would stay all proceedings under the decree, not altering the decree, but staying proceedings under it, on the ground that the prosecution of the accounts directed by it would produce nothing but vexation and expense. I do not say whether the Court would do so or not, but the Plaintiffs ought not to be precluded by this order from taking any proceedings they may think desirable to stay the proceedings under the decree; and, to prevent any contention that it has that effect, it will be expressed to be without prejudice to such application, if any, as the Plaintiffs may be advised to make for the staying of all further proceedings under the decree or for discontinuing part of the action. It must not be supposed that because we insert those words, we in any way favour such application, or consider that if any such application

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is made it ought to be granted. Such application if made must be dealt with by the Court below and by the Court of Appeal entirely without any prejudice from anything that has passed on the present occasion. As regards the costs, we think that the Appellants have succeeded before us, and therefore ought to have the costs of the appeal; but that the costs before Mr. Justice *Pearson* ought to be costs in the action.

LINDLEY, L.J.:—

I am of the same opinion. In the first place, I cannot agree that Mr. Justice *Pearson* took a proper course in dismissing the summons with costs, because it asks only that the accounts should be brought in within four days. The right way of dealing with a summons of that kind, if it is irregular or improper in point of form, is to order it to be amended or treated as amended. That is clearly shewn by Gen. Ord. LIX., rule 2 (Order, April, 1880, rule 44), which enables a judge to amend any defect or error in any proceedings, and to make all such amendments as may be necessary for the purpose of determining the real questions. There has been here a foreclosure decree, an ordinary summons to proceed with the accounts was issued, and the Chief Clerk made a note that the Plaintiffs were to bring in their accounts by the 1st of November, 1882. The accounts were not proceeded with because an appeal from the decree was pending, which made it natural that those accounts should not be prosecuted. The appeal having been decided in favour of the mortgagees, they say now, "We do not want to go on to a foreclosure; we are satisfied that the amount due to us so far exceeds the value of the property that it would only be throwing good money after bad, and we do not intend to go on." The Defendants contend that they must go on. I think that contention has been put a little too high. I cannot conceive that there is a want of power or jurisdiction in the Court to stay proceedings upon a proper application and on proper materials. I therefore accede to this, that whatever order we make now should be without prejudice to any application to stay those proceedings. It would be to my mind perfectly shocking, if, in a case in which it was clear that on taking the accounts £10,000 at least would be found due to the mortgagees,

and the property was only worth £5000, the mortgagor could force the mortgagees to go on to take the accounts, which would be only adding to the bad debt. There must be power in the Court to deal with such a case as that. I do not say that any such case exists here. I am only meeting the argument of Mr. *Davey* that he has a right to force on the accounts without regard to consequences. I think the proper mode of dealing with the case is that which has been suggested by Lord Justice *Cotton*. We discharge the order of the Court below, and the Defendants requiring these accounts to be brought in, order the Plaintiffs to bring them in within a time to be named, the order to be without prejudice to any application that may be made to stay proceedings or discontinue the action so far as relates to the accounts, the costs of the application in the Court below to be costs in the action, and the Respondents being ordered to pay the costs of this appeal.

Solicitors for Plaintiffs: *Gregory, Rowcliffes, & Co.*
Solicitors for Defendants: *Law, Hussey, & Hulbert.*

H. C. J.

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Aug. 3.

BROWN *v.* COLLINS.

[1870 B. 71.]

Practice—Infant—Ward of Court—Alien—Infant Member of Class mentioned in Title to Account.

A fund was carried over in an administration action to a separate account, intituled "The account of *A. B.*, and of *X. Y.*, and his issue," to answer a settled legacy under the will of the testator, wherein *A. B.* and *X. Y.* had life interests.

X. Y. was a domiciled Frenchman, and he died leaving issue three daughters only, who were all French and married to Frenchmen, two of them having married under age, and one being still an infant. *A. B.* having also died, these three daughters and their husbands petitioned for payment out to them of their respective shares:—

Held, that the Court would not in the exercise of its discretion treat the two daughters who had married under age as wards of Court.

Semble, the carrying of a fund to separate account of an infant in an action to which the infant is not a party will not constitute such infant a ward of Court, and even if such carrying over would have constituted a natural born British subject a ward of Court, it would not have that effect in the case of an alien not resident in this country.

Observations on *De Pereda* v. *De Mancha* (1).

PETITION.

In an administration action a sum of consols was carried over to a separate account intituled "The account of *E. B. Aly*, the wife of *R. Aly*, and of her son *W. S. Aly* and his issue," in order to answer a legacy given by the will of the testator, in which *E. B. Aly* and *W. S. Aly* had successive life interests, with reversion as to the *corpus*, after the death of the survivor of them to the issue of *W. S. Aly*.

R. Aly, and *W. S. Aly* were domiciled Frenchmen. *E. B. Aly* died in 1880; *W. S. Aly* died in 1883, leaving issue three daughters and no more him surviving. All these three daughters were French and married to Frenchmen, and resident in *France*. One of them married after having attained the age of twenty-one years, another married under that age and had since attained twenty-one, and the remaining daughter married under that age, and was still an infant.

(1) 19 Ch. D. 451.

After the death of *W. S. Aly*, a petition was presented by the two adult daughters and their husbands, the infant daughter and her husband being respondents, praying for the payment out to the three husbands in equal shares of the fund standing to the separate account aforesaid; and the question arose whether the two daughters who were infants at the dates of their respective marriages were wards of Court, so that their respective shares or a proper proportion of them ought to be required by the Court to be settled in the usual way.

The petition was first brought on on the 1st of August, 1883.

On that occasion, after *D. L. Alexander* for the Petitioners had opened the petition,

Northmore Lawrence, for the Respondents, mentioned *In re Tweedale's Settlement* (1), and *De Pereda* v. *De Mancha* (2), and

Mr. Justice *Kay* feeling a difficulty, owing to the conflict of authorities, desired that the case should be taken direct to the Court of Appeal.

This was accordingly done, and the Court of Appeal consisting of *Brett*, M.R., and *Cotton*, and *Bowen*, L.JJ., held (3), that they had no jurisdiction to hear the petition in the first instance, and that the case could only be brought before them on appeal after Mr. Justice *Kay* had decided it.

It was accordingly now brought on a second time before his Lordship.

Northmore Lawrence, for the Respondents:—

The decision of Vice-Chancellor *Hall*, in *De Pereda* v. *De Mancha*, appears to have rested on two grounds, the first, that as moneys had been paid in in an administration action to the separate account of an infant, there was a fund in Court which the Court had to administer for the infant, and that this constituted her a ward of Court, although she was not a party to the action.

The second ground was that before the institution of the action

(1) Joh. 109. (2) 19 Ch. D. 451.
(3) Weekly Notes, 1883, p. 155.

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a summons for the appointment of a guardian for the infant had been taken out, and an arrangement made as to access to her, so that something akin to an order had been made with regard to the infant, which again made her a ward of Court.

To take the second ground first, no doubt it had been previously held in *In re Graham* (1), that an order for the maintenance of an infant without suit constituted the infant a ward of Court, and in *In re Hodges' Settlement* (2) (referred to by Vice-Chancellor *Hall* in his judgment), when a fund belonging to an infant had been paid in under the *Trustee Relief Act*, and an order had been made for payment of the interest to the infant's testamentary guardian, that was held to make her a ward of Court. But in *De Pereda* v. *De Mancha* (3), no such order had been made, nor in fact was any order made upon the summons at all. And it is submitted that the decision cannot be supported on the first ground either; because the jurisdiction of the Court over the infant is not founded upon the principle that the Court has property of the infant to administer (although it is generally the possession of property by the infant which gives the Court an opportunity of acting) but upon the parental relation in which the Court stands towards an infant British subject, and it is derived from the title of a British born subject to the protection of the Crown as *parens patriæ*. *Hope* v. *Hope* (4); *Simpson* on Infants (5). And whether *De Pereda* v. *De Mancha* is well decided or not it is distinguishable from the present case upon this ground. Here the infant is not even a foreigner resident in this country, and while so resident to a certain extent, and for many purposes (including this very jurisdiction over infants), a subject of the Crown of *England: Hope* v. *Hope* (6); but she is an alien infant who has never been in the country at all, and there is no authority for the proposition that the fact of the Court having property of such an infant to administer would constitute her a ward of Court.

[Mr. Justice *Kay* referred to *Stuart* v. *Marquis of Bute* (7).]

(1) Law Rep. 10 Eq. 530.
(2) 3 K. & J. 213. 3 Jur N S 1030
(3) 19 Ch. D. 451.
(4) 4 D. M. & G. 328, 345.
(5) Page 136.
(6) 4 D. M. & G. 346, 347.
(7) 9 H. L. C. 440. 7 Jur N S 1129

That was a case of custody, and there had been an order in Chancery on petition constituting a guardian of the infant, which was held to make the infant a ward of Court. In that case also it was said (1), that the benefit of the infant was the foundation of the jurisdiction, and that it was the duty of the Courts of Session, by their *nobile officium* conferred upon them by their Sovereign as *parens patriæ* to take care of all infants who required this protection. And this was irrespective of any question of property.

It is submitted, therefore, that in this case the Court will not attempt to carry a jurisdiction, which after all is discretionary, further than it has ever been carried before, but will order the fund to be paid out to the husband, who, according to the evidence of the law of *France*, is the person entitled to receive it.

D. L. Alexander, for the Petitioners, supported the same contention, and referred to *Simpson* on Infants (2), and *De Geer* v. *Stone* (3).

In the course of the arguments reference was also made by Mr. Justice *Kay* to: *In re Fynn* (4); *In re Spence* (5).

KAY, J.:—

The Petitioners in this case are aliens in the strictest sense; they are not the children of British subjects, nor the children of a person whose father was a British subject, and therefore they do not come within the statutory definition of British subjects any more than they do within the common law definition of British subjects (6).

There is a fund in Court to which the Petitioners were entitled in reversion in certain shares. That fund stands to an account which does not mention them by name, but contains a description of the class within which they come, and the life interests having come to an end, they now ask that the fund shall be paid out, and an order made for payment of their respective shares to their husbands.

(1) 9 H. L. C. 463.
(2) Page 222.
(3) 22 Ch. D. 243.
(4) 2 De G. & Sm. 457.
(5) 2 Ph. 247.
(6) See 7 Anne c. 5; 4 Geo. 2, c. 21, s. 1; 13 Geo. 3, c. 21, s. 1; and *De Geer* v. *Stone*, 22 Ch. D. 243.

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In the case of one of them who married under age and is still an infant, it is proved to me that by the law of the country of which the infant and her husband are both natives, her share ought to be now paid to the husband, or to some person shewn by evidence to be properly authorized to receive it on his behalf. But the question is, whether the infant is so far a ward of Court that the Court must require the fund to be settled or otherwise dealt with before it can allow it to be paid out. Now the case of *De Pereda* v. *De Mancha* (1), the reasoning of which I confess I have some difficulty in following, certainly makes it very difficult for me to say that if the infant were a British subject she would not be a ward of Court. The only distinction between that case and the present is that in the former the fund was standing to an account the title of which included the name of the infant, so that the fund was practically standing in the name of the infant. Here it is standing to an account which includes the class of which the infant is one, but does not mention her name. However, looking at the decision in *De Pereda* v. *De Mancha*, I am afraid that I could not, if this were the case of a British subject, say that there is any essential difference between the two cases; because the reasoning of that decision, as I understand it, is this—if there be a fund in Court under its administration standing to the account of an infant, or to an account under which an infant is entitled, then inasmuch as the Court is bound to administer that fund, the infant will be treated as a ward of Court to the same extent as an infant who is a party to an action for the administration of property belonging to that infant. Undoubtedly, we use the words "ward of Court" in such a case in rather a special sense. In one sense all British subjects who are infants are wards of Court, because they are subject to that sort of parental jurisdiction which is intrusted to the Court in this country, and which has been administered continually by the Courts of the Chancery Division. It may be exercised as it has been in many cases, such as *In re Fynn* (2) and *In re Spence* (3), whether they have property or not, although, of course, where the infant has no property it makes it extremely difficult to exercise

(1) 19 Ch. D. 451. (2) 2 De G. & Sm. 457.
(3) 2 Ph. 247.

the jurisdiction at all; but supposing a case to arise respecting the custody of the infant, it has been declared again and again, and especially in those two cases, that it is not the fact of there being property under the control of the Court of Chancery which gives the jurisdiction. The jurisdiction exists from the fact that the infant is a British subject, and the Chancery Division has always exercised that parental jurisdiction over British subjects who are infants. But then we use the words in a special sense. Certainly where an infant being a British subject is a party to an action for administration of his property, such infant cannot marry without the leave of the Court. Yet it would be absurd to say that the leave of the Court is requisite for the marriage of every infant who happens to be a British subject, whether the Court has property of that infant to administer or not; and in that sense certainly every British subject who is an infant is not a ward of Court in the peculiar sense in which the words are used where an infant is a party to an action in which the property of that infant is being administered. I have always understood that that peculiarity was restricted to cases in which the infant either was actually a party to an action in which the property was being administered, or was in the position of being a party, like the case of *In re Hodges' Settlement* (1). There the money was paid into Court under the *Trustee Relief Act*, and then an order had been made with respect to that money, and by the 2nd section of the *Trustee Relief Act*, such an order has the effect of an order in an action to which the infant is a party. In that case it was decided, and I believe on account of those words in the *Trustee Relief Act* (2), that the infant was a ward of Court. So in the case of *Stuart* v. *Marquis of Bute* (3), it was certainly said by one of the noble Lords, the then Lord Chancellor, that if a petition was presented to the Court of Chancery under its parental jurisdiction, and an order made upon that petition for the appointment of a guardian of the infant, although the infant was not a party to any action, he would be a ward of Court in the more special sense of the words. I do not remember any case in which where money

(1) 3 K. & J. 213. 461; *Re Wilts, &c., Railway Company*,
(2) See *Re Hillary*, 2 Dr. & Sm. Ibid. 552.
(3) 9 H. L. C. 440, 446.

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was merely paid into Court to an account under which an infant might take an interest it has been decided that the infant thereby became a ward of Court (1). The consequence would be very serious if it were so. There is a great deal of money standing to the credit of the Court of Chancery. A legacy is paid to a separate account, to an account in which under a class description infants may be interested, and could it be said that anybody marrying an infant who happened to have an interest in money so standing in the Court of Chancery could be committed for contempt? I confess that the doctrine is altogether a novel one to me. Without at all intimating any opinion that the case of *De Pereda* v. *De Mancha* (2) has been wrongly decided (which, of course, I should not venture to say), it seems to me very doubtful whether, even if rightly decided, it could be intended to include a case like this. In this case the money paid into Court was a mere legacy, the infant was not a party, and would not have been properly a party to the action under which the money was paid in even under the old practice. The money was only paid in because it was subject to a trust for one for life with remainder over, and it was not at the moment distributable. I should hesitate very long before I held that that made an infant who was entitled in reversion to a share of that money a ward of Court.

In this case, besides that fact, the infant is an alien; and although it seems clear that if an alien were domiciled in this country, and therefore subject to the protection of the law of this country while resident and domiciled here, she might be made a ward of Court; yet this infant is not domiciled here, and she is not and never has been resident here, and the only circumstance rendering it possible to treat her as a ward of Court is the fact that this money has been paid to this account in the Court of Chancery. However, even if strictly the Court could treat her as a ward of Court, I think it sufficiently appears from what has been read to me from the judgment in *Hope* v. *Hope* (3), that the Court has a discretion in the matter. So that

(1) See *Re Hillary*, 2 Dr. & Sm. 461; *Re Wilts, &c., Railway Company*, Ibid. 552.

(2) 19 Ch. D. 451.

(3) 4 D. M. & G. 328, 345.

supposing the Court able to treat her as a ward, it will exercise its discretion, and I should think it right in this case to exercise it by not treating her as a ward of Court at all. But I confess I have very great doubt, to say the least of it, whether she is or could be made in any sense a ward of the Court of Chancery, and, having that doubt, I think it right to make the order for payment of the money to the husband.

Solicitors: *T. W. Denby; Poole, Hughes, & Poole.*

W. W. K.

NORTH, J.

1883

Nov. 2.

LITCHFIELD *v.* JONES.

[1882 L. 3430.]

Practice—Disobedience to Order for Discovery—Attachment—Motion to commit—Omission to serve Copy of Affidavit with Notice of Motion—Rules of Supreme Court, 1883, *Order* XXXI., *r.* 21; *Order* LII., *r.* 4.

On giving a notice of motion to commit a Defendant for contempt in disobeying an order for discovery, the Plaintiffs omitted to serve with the notice of motion a copy of an affidavit which they stated in the notice that they should read in support of the motion :—

Held, that rule 4 of Order LII. applied to such a notice of motion, and not only to a case in which a writ of attachment would have issued under the old Common Law practice, and that the notice of motion was, therefore, irregular.

But, *held*, that the motion should not be at once dismissed, but should be ordered to stand over until after the hearing of a summons by the Defendant for further time to make the discovery.

MOTION.

This was a motion by the Plaintiffs, asking that the Defendant might be committed to prison for contempt of Court in not having made and filed a further affidavit of documents pursuant to an order dated the 6th of April, 1883, and for not having made and filed a further affidavit in answer to certain interrogatories delivered by the Plaintiffs, pursuant to an order dated the 11th of June, 1883. The time limited for the filing of the affidavits in question expired on the 24th of July, 1883, and the Defendant obtained an extension of time to the 1st of October, and afterwards a further extension to the 24th of October. The affidavits were not filed within the time, and on the 23rd of October the Defendant took out a summons for a further enlargement of the time. The hearing of this summons was, on the 26th of October, adjourned to the Judge. On the 29th of October the Plaintiffs gave notice of the present motion. At the foot of the notice was a note stating that a joint affidavit made by four persons, whose names were given (which had been already sworn, and would be filed the next day), would be read in support of the motion, but no copy of this affidavit was served with the

notice of motion. When the motion came on to be heard it was stated by the Defendant's counsel that the required affidavit of documents and the affidavit in answer to interrogatories had been filed since the service of the notice of motion.

Cookson, Q.C., and *Seward Brice*, for the Plaintiffs:—

Under rule 21 of Order XXXI. of the Rules of the Supreme Court, 1883, the Defendant is liable to attachment.

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for the Defendant:—

The Plaintiffs have not complied with the provision of rule 4 of Order LII. (1) of the Rules of the Supreme Court, 1883, and the motion ought to be dismissed.

Cookson, in reply:—

This is not a motion for attachment within the meaning of rule 4 of Order LII. That rule applies only to such an attachment as is within rule 2, *i.e.*, to a case in which under the old practice at Common Law a writ of attachment would have issued. No such writ would have issued in the Court of Chancery in a case like the present.

But, even if rule 4 does apply, the Defendant is not entitled to have the motion dismissed; we ought to have an opportunity of correcting the mistake.

NORTH, J.:—

Rule 21 of Order XXXI. prescribes the penalty for disobedience to an order for discovery or to answer interrogatories, viz.,

(1) Order XXXI. rule 21, provides that, "If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment."

Order LII. rule 2: "No motion or application for a rule *nisi* or order to shew cause shall hereafter be made in any action, or (a) to set aside, remit, or enforce an award, or (b) for attachment, or (c) to answer the matters in an affidavit, or (d) to strike off the rolls, or (e) against a sheriff to pay money levied under an execution."

Rule 4: "Every notice of motion to set aside, remit, or enforce an award, or for attachment, or to strike off the rolls, shall state in general terms the grounds of the application; and, where any such motion is founded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion."

NORTH, J. 1883 LITCHFIELD v. JONES.

liability to attachment, and I think that rule 4 of Order LII. applies in such a case, though it may apply also to other cases. But I shall not dismiss the motion now. I shall order it to stand over until after I have heard the Defendant's summons for an extension of the time for complying with the order.

The summons for time was heard in Chambers on the 8th of November, and, the affidavits required by the orders of the 6th of April and the 11th of June having been filed by the Defendant, was dismissed without costs. By consent the motion for committal was then also disposed of, and was dismissed without costs.

Solicitor for Plaintiffs: *G. H. Carthew.*
Solicitor for Defendant: *R. Blackett Jones.*

W. L. C.

NORTH, J. 1883 *Nov.* 3.

In re LLEWELLYN. LANE *v.* LANE.

[1882 L. 3441.]

Practice—Administration Action—Reference to Chambers—Action commenced before the 24th of October, 1883—Rules of Supreme Court, 1883, Order LV., r. 10.

Rule 10 of Order LV. of the Rules of the Supreme Court, 1883, applies to an administration action commenced before, but tried after, those rules came into operation.

An order was therefore made referring such an action to Chambers to determine whether it was necessary that a general administration of the estate should be directed.

THIS action was brought for the administration of the real and personal estate of *William Llewellyn*, who died on the 22nd of August, 1876. The testator appointed his son, the Defendant *W. T. Llewellyn*, and his daughter, the Plaintiff *Eliza T. Lane* (the wife of the defendant *F. C. Lane*), trustees and executors of his will. The action was brought by Mrs. *Lane* and her only child, an infant, by a next friend, against her husband and her co-executor. The writ was issued on the 8th of December, 1882. In addition to administration the Plaintiffs claimed the appoint-

ment of a receiver of the testator's estate. The pleadings shewed that several questions as to the administration of the estate had arisen between the parties. The action now came on for trial upon a notice of trial dated the 2nd of October, 1883. Minutes of a general administration judgment had been agreed on by the parties, providing also for the appointment of a specified person as receiver.

S. B. L. Druce, for the Plaintiffs, asked for a judgment in the terms of the minutes agreed upon:—

[NORTH, J.:—Why should there be a general administration of the estate? It may be necessary to have the direction of the Court as to the questions which have arisen between the parties, but this direction can now be given without a general administration.]

The action was commenced before the Rules of 1883 came into operation, and would have been brought on for trial before the Long Vacation, but for the fact that the arrangement as to the appointment of a receiver was not completed in time.

T. H. Robertson, for the Defendants.

NORTH, J.:—

I will refer the action to Chambers to be dealt with there. If an administration judgment is necessary it can now be pronounced in Chambers. I do not see that the mere fact that the action was commenced before the new rules came into operation is a sufficient reason for ordering a general administration of the estate. Rule 10 of Order LV. provides that "it shall not be obligatory on the Court or a Judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order." I think this rule applies to the present action, and, so far as I can see, the questions which arise can be properly determined without an administration judgment. I shall, therefore, refer the action to Chambers to determine whether there ought to be a judgment for general administration.

NORTH, J.
1883
In re LLEWELLYN.
LANE *v.* LANE.

Druce:—The appointment of a receiver must be made in Court.

NORTH, J.:—It can be made by the Judge in Chambers.

Druce:—An immediate appointment is desirable.

NORTH, J.:—The parties consenting, I will appoint the gentleman who is proposed as receiver now.

Solicitors: *Lempriere, Hamond, & Browne; Merediths, Roberts, & Mills*, agents for *Osborne, Ward, Vassall, & Co., Bristol.*

W. L. C.

NORTH, J.
1883
Nov. 10.

STREET *v.* CRUMP.

[1882 S. 4616.]

Practice—Default of Pleading to Counter-claim—Motion for Judgment—Rules of Supreme Court, 1883, *Order* XXIII., *r.* 4; *Order* XXVII., *rr.* 11, 12.

Order XXIII., rule 4, and Order XXVII., rules 11, 12, of the Rules of 1883, apply when a motion for judgment in default of pleading is made after, although the default itself was made before, they came into operation.

And these rules apply to a case where a defendant to a counter-claim has made default in pleading to it, and entitle the plaintiff in the counter-claim to move for judgment against the defaulting defendant.

THIS was a motion by the Plaintiff in a counter-claim for judgment against one of the Defendants for default of pleading to the counter-claim.

The original action was brought by *W. S. Street* against *J. H. Crump* and *Nancy Egersdorff* (widow). The writ was issued on the 16th of October, 1882. By his amended statement of claim, delivered the 23rd of February, 1883, the Plaintiff alleged that on the 2nd of January, 1881, he advanced to the Defendant *Crump* the sum of £200 on the security of a promissory note of the same date made by *Crump* in the Plaintiff's favour, and of the deposit of some title deeds which purported to be in his possession as mortgagee of Mrs. *Egersdorff*, the deposit being accompanied with a memorandum of deposit signed by *Crump*, and stating the dates of the deeds deposited and the names of the parties thereto

respectively. The last of the documents so deposited was described in the memorandum as "10th July, 1877. *N. Egersdorff* to *J. H. Crump*." The Plaintiff alleged that the document so described was a memorandum of agreement of that date between Mrs. *Egersdorff* and *Crump*, whereby she agreed that the other deeds afterwards deposited with *Street* should be held by *Crump* as an equitable security for the repayment, with interest, of £400 lent by Mrs. *Egersdorff* to him. The Plaintiff alleged that the note for £200 had been dishonoured at maturity, and he claimed a declaration that he was, by virtue of the deposit and memorandum, entitled to an equitable mortgage or sub-mortgage upon the property comprised in the deeds for the £200 and interest; to have an account taken of what was due to him for principal, interest, and costs in respect of such equitable mortgage, and payment by *Crump* of what should be found due to the Plaintiff on such account, and in default of such payment to have an account taken of what was due to *Crump* for principal and interest on the equitable mortgage of the 10th of July, 1877, and in default of payment to the Plaintiff by Mrs. *Egersdorff* of what should be found due to him for such principal, interest, and costs, and the residue (after deducting what should be so found due to the Plaintiff) of what should be found due by *Crump* to him, that Mrs. *Egersdorff* might be foreclosed of all equity of redemption in the mortgaged property, and that thereupon subsequent interest might be computed on the Plaintiff's mortgage and subsequent costs added thereto, and in default of payment of what should be then found due to the Plaintiff, that the Defendant *Crump* might be also foreclosed of all equity of redemption in the mortgaged property. Mrs. *Egersdorff*, on the 11th of December, 1882, delivered a statement of defence and counter-claim, to which *Street* and *Crump* were made Defendants, and by which she alleged that nothing was due by her to *Crump*. She did not admit that she ever signed the alleged memorandum of the 10th of July, 1877, and said that, if she did sign that memorandum, she was induced to do so without any knowledge of its contents by the false and fraudulent representations of *Crump* as to its contents, while professing to advise her as her solicitor. And by her counter-claim she claimed a declaration that neither *Street* nor *Crump* was

NORTH, J. 1883 STREET v. CRUMP.

entitled to any equitable mortgage, sub-mortgage, or charge on the property comprised in the deeds which had been deposited by *Crump* with *Street;* that *Street* and *Crump*, or *Street* alone, might be ordered to deliver up to her the deeds relating to the property in question which were in their or his possession, and also any memorandum of charge thereon alleged by *Street* to have been given by her to *Crump* and then in *Street's* possession. *Street*, on the 1st of March, 1883, delivered a reply to the defence and counter-claim, and on the 5th of March, 1883, Mrs. *Egersdorff* delivered a rejoinder. *Crump* did not deliver any reply, or any other pleading to the counter-claim, and did not obtain any enlargement of the time for so doing. On the 1st of November, 1883, Mrs. *Egersdorff* served on *Crump* a notice of motion in default of his pleading, for such judgment as she should be entitled to on her counter-claim. The motion was set down and now came on for hearing as a short cause. *Crump* did not appear, nor did the Plaintiff.

Frank Evans, for the motion:—

A compromise has been already entered into between Mrs. *Egersdorff* and *Street*, under which he has delivered up to her the documents relating to the property which were in his possession. The present motion is, therefore, only against the Defendant *Crump*. The default in pleading having been made by him before the new Rules came into operation, the case appears to be governed by the old Rules.

NORTH, J.:—

I think your rights must depend upon the Rules as they stand now. The preface to the new Rules says that "they shall come into operation on the 24th of October, 1883, and shall also apply, so far as may be practicable (unless otherwise expressly provided), to all proceedings taken on or after that day in all causes and matters then pending." You are moving for judgment to-day, and I think the new Rules apply. Rule 4 of Order XXIII. says that "where a counter-claim is pleaded, a reply thereto shall be subject to the Rules applicable to statements of defence." And by rule 11 of Order XXVII., "In all other actions than those in the preceding Rules of this Order mentioned, if the

defendant makes default in delivering a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the statement of claim the Court or a Judge shall consider the plaintiff to be entitled to." Then by rule 12, "Where, in any such action as mentioned in the last preceding Rule, there are several defendants, then, if one of such defendants make such default as aforesaid, the plaintiff may either (if the cause of action be severable) set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants." Under those rules I think you are entitled to move for judgment against *Crump*.

Evans:—I ask for a declaration that *Crump* is not entitled to any mortgage or charge on the property or the documents relating thereto, and that the document of the 10th of July, 1877, is void and ought to be set aside; and for an order that *Crump* do deliver up to Mrs. *Egersdorff* the documents in his possession, and do pay her costs of the action and the counter-claim.

NORTH, J.:—How can I order delivery up of the deeds behind the back of *Street?* He has an interest in them. If he had appeared and consented I should have had no difficulty. But as it is, I can only make the order to which you are entitled on your pleadings.

Evans:—*Street* has given up the deeds to Mrs. *Egersdorff*.

NORTH, J.:—But that does not appear on the pleadings.

Evans:—We can produce a consent brief for *Street* to the Registrar.

NORTH, J.:—That will be sufficient. You may take the order subject to the production of a consent brief or an authority to appear on behalf of *Street* to the Registrar.

Solicitors: *F. Parish; H. H. Poole.*

W. L. C.

NORTH, J.
1883
Nov. 12.

In re AMES.
AMES *v.* TAYLOR.

[1876 A. 124.]

Costs—Taxation—Solicitor Trustee of Will—Authority by Testator to charge for non-professional Business.

A testator by his will authorized any trustee thereof who might be a solicitor to make the usual professional, or other proper and reasonable charges, for all business done and time expended in relation to the trusts of the will, whether such business was usually within the business of a solicitor or not. On the further consideration of an action for the administration of the testator's estate an order was made for the taxation of the costs, charges, and expenses of the trustees, and it was directed that the Taxing Master should have regard to the terms of the will as to the costs of the trustees:—

Held, that the Taxing Master had power to allow to a trustee who was a solicitor the proper charges for business not strictly of a professional nature transacted by him in relation to the trust estate.

ADJOURNED SUMMONS.

This action was brought to administer the estate of *H. M. Ames*.

The will of the testator contained the following clause: "And also that my said trustees shall and may out of the trust premises reimburse themselves, and allow to their co-trustee and co-trustees, all costs and expenses which they respectively shall incur on account of the trusts or powers aforesaid, or the management and execution thereof, or otherwise relating thereto, and particularly that it shall be lawful for any of my said trustees and executors who may be a solicitor to transact any business occasioned by the trusts, powers, or provisions of this my will, or otherwise connected with the getting in or management of my estate or effects, whether such business be usually within the business of a solicitor or not, and that he shall be allowed to make the usual professional or other proper and reasonable charges for all business done and time expended in relation thereto, notwithstanding his being a trustee or executor, or any maxim to the contrary."

By the order made on the further consideration of the action on the 16th of January, 1883, it was referred to the Taxing

Master to tax the costs of the Plaintiffs and Defendants, and of the several parties having liberty to attend the proceedings, as between solicitor and client, including in the costs of the Defendant *Robert Taylor*, and of the Defendants *C. H. Cadogan* and *C. H. Ames*, and of the Plaintiff *L. E. Ames* (the executors and trustees of the testator's will) any charges and expenses properly incurred by them relating to the administration of the testator's estate, or the execution of the trusts of his will, beyond the costs of the action, but the Taxing Master was to allow the said executors and trustees one set of costs only, and he was in taxing such costs to have regard to the terms of the will as to the costs of the executors and trustees.

The Defendant *Robert Taylor* was a solicitor, and he had been the testator's solicitor. The executors severed in their defences to the action, and *Taylor* acted for himself alone. Under the order he carried in his bill of costs for taxation, and in it he charged for various matters of business transacted by him not of the nature of the ordinary professional business of a solicitor. The Taxing Master disallowed the charges for non-professional business. *Taylor* carried in objections to the taxation, and in answer to the objections the Taxing Master said: "I have given to Mr. *Taylor* his costs, charges, and expenses properly incurred. But beyond those costs Mr. *Taylor* claims certain charges set out in detail in the objections to the taxation, and which charges he terms 'non-professional charges.' I have no power to give any but professional charges, and moreover the items claimed are fully covered in one way or another by the costs, charges, and expenses I have allowed. I consider the words of the will are to be read as giving Mr. *Taylor* his costs, charges, and expenses properly incurred, and nothing more. If the testator had intended to benefit Mr. *Taylor* for extra work and trouble in the trust, he should have given him an annuity during the continuance of the trust. I have, therefore, overruled the objections."

The Defendant *Taylor* took out a summons to vary the Taxing Master's certificate.

Maidlow, for the summons:—

Where a testator gives such a special direction the Taxing

NORTH, J. 1883 *In re* AMES. AMES v. TAYLOR.

Master has power to allow charges for non-professional services rendered by a solicitor, and to settle the amount: *Ellison* v. *Airey* (1); *Willis* v. *Kibble* (2).

G. Curtis Price, for the Plaintiff:—

This is a matter within the discretion of the Taxing Master; Order LXV., r. 27, sub-s. 38. An executor will not be allowed the charges of his solicitor for doing things which the executor ought strictly to have done himself: *Harbin* v. *Darby* (3). The trustees having severed in their defence, only one set of costs ought to be allowed to them to be apportioned by the Taxing Master: *Attorney-General* v. *Wyville* (4). An agreement that a solicitor who is a trustee shall be allowed charges beyond costs out of pocket will be strictly construed: *Moore* v. *Frowd* (5): and, except under very special circumstances, executors will not be allowed to charge for the employment of an agent: *Weiss* v. *Dill* (6). The Taxing Master has exercised his discretion, and has allowed the solicitor an ample remuneration and the Court will not interfere.

NORTH, J.:—

Whether if the taxation is reviewed the solicitor will be able to maintain any of the charges which have been disallowed I do not know, though I think it is clear that he will not be able to maintain all of them. All I have now to say is that in my view the Taxing Master has declined to allow any of those charges which are called non-professional, upon a question of principle as to which it is open to me to review his decision. The testator by his will has empowered any trustee who may be a solicitor to transact any business occasioned by the trusts, powers, or provisions of his will, "whether such business be usually within the business of a solicitor or not," and "to make the usual professional or other proper and reasonable charges for all business done and time expended in relation thereto." In relation to what? In relation to business transacted by him in connection

(1) 1 Ves. Sen. 111.
(2) 1 Beav. 559.
(3) 28 Beav. 325.
(4) 28 Beav. 464.
(5) 3 My. & Cr. 45.
(6) 3 My. & K. 26.

with the trusts of the will, whether of the nature of the business usually transacted by a solicitor or not. In my view of the will and of the order on further consideration the costs and charges properly incurred which Mr. *Taylor* is to be allowed are not to be limited to professional costs, but are to include other costs and charges properly incurred. The Taxing Master says that he has no power to give any but professional charges. I think that in this respect the Taxing Master is wrong, and that he had power to allow non-professional charges properly incurred. He seems to me to have thrown over that part of the order which directs him to have regard to the terms of the will as to the costs of the trustees. In my opinion the clause which I have read from the will shews that it was the intention of the testator to give Mr. *Taylor* the costs and charges of business other than strictly professional business, if they were properly incurred, and the Taxing Master has disregarded the directions of the will. I do not see how he can be right in saying that all the non-professional charges are covered by what he has allowed in other ways. I must refer the matter back to him generally to review his taxation, having regard to my opinion that non-professional charges properly incurred may be allowed—of course I express no opinion as to the particular items. The costs of the summons will be reserved.

Solicitors: *James Taylor, Mason, & Taylor; Bowlings, Foyer, & Hordern.*

W. L. C.

PEARSON, J.

1883

Nov. 19.

TOWSE *v.* LOVERIDGE.

[1883 T. 1875.]

Practice—Parties—Third Party Procedure—Notice to co-Defendant—Leave of Court or a Judge—Rules of Supreme Court, 1883, *Order* XVI., *rr.* 48, 55.

Under rule 55 of Order XVI., a Defendant need not obtain the leave of the Court or a Judge before issuing to a co-Defendant a notice claiming contribution or indemnity from him. But it will be open to the co-Defendant, after he has been served with the notice, to move to set aside the service.

THE Defendant *Loveridge* desired to issue a notice under rule 55 of Order XVI., to some co-Defendants from whom he claimed to be entitled to indemnity against any damages and costs which he might be ordered to pay to the Plaintiffs. The Clerk of Records and Writs refused to issue the notice without the previous leave of the Court. The matter was now mentioned to the Court.

Elgood, for the Defendant:—

Under rule 55 (1) the leave of the Court to issue such a notice to a co-Defendant is not required as it is under rule 48 for the issue of a notice to a person who is not already a party to the action. The words "by leave of the Court or a Judge" occur in rule 48, but they are omitted from rule 55. It was intended that the Court or a Judge should exercise a discretion

(1) Rule 48 provides that "Where a defendant claims to be entitled to contribution, or indemnity over against any person not a party to the action, he may, by leave of the Court or a Judge, issue a notice (hereinafter called the third party notice) to that effect, stamped with the seal with which writs of summons are sealed."

Rule 55: "Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure shall be adopted, for the determination of such questions between the defendants, as would be issued and taken against such other defendant, if such last mentioned defendant were a third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action."

as to bringing a new party into the action, but that does not apply to a person who is already a party.

PEARSON, J.

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TOWSE v. LOVERIDGE.

PEARSON, J.:—

I do not think my sanction is required in the first instance. Of course it will be open to the Defendants, after they have been served with the notice, to move to set aside the service.

Solicitors: *Gush, Phillips, & Walters.*

W. L. C.

MATHEW, J.

1883

Nov. 6.

WILKINS *v.* MAYOR OF BIRMINGHAM.

[1881 W. 3354.]

38 & 39 *Vict.* c. 36, s. 19, *Sched.*, s. 6—*Compensation—Publication—Notice to treat—Arbitrator—Lands Clauses Act*, 1845, ss. 18, 121 [*Revised Ed. Statutes, vol. ix. pp.* 633, 659].

Sect. 121 of the *Lands Clauses Act* as to compensation for interests less than a year is incorporated in the *Artisans' and Labourers Dwellings Improvement Act*, 1875.

The publication of the requisition under sect. 6 of the schedule to the *Dwellings Improvement Act* is analogous to the notice to treat under the *Lands Clauses Act*, and a landowner affected by it cannot afterwards alter his position.

An arbitrator under the *Dwellings Improvement Act* may, when a claim for compensation is brought before him, assess the amount of compensation without deciding as to the right of the claimant.

JOSEPH WILKINS, the Plaintiff, was in 1879 the leaseholder of a public-house at *Birmingham* called the *Waterloo Tavern* for a term of eight years, which would expire at Lady Day, 1880, at a rent of £84. The Defendants, who were the local authority for the borough of *Birmingham*, within the meaning of the *Artisans' and Labourers' Dwellings Improvement Act*, 1875 (38 & 39 Vict. c. 36), made in 1876 a scheme for the improvement of an unhealthy area, in which area the Plaintiff's public-house was situated. The proper steps were taken and the scheme was confirmed by an Act passed in 1876. The local authority proceeded with the scheme and duly deposited the plans for the improvement; and in July and August, 1879, they duly published the particulars required by the 6th section of the schedule to the *Dwellings Improvement Act*, and sent to *Daniel Mayou*, the owner of the reversion expectant on the lease of the public-house, a copy of the particulars, and gave to the Plaintiff notice that they did not intend to take compulsorily any interest which he might have as lessee. After this, on the 23rd of October, 1879, *Mayou* granted to the Plaintiff a lease of the public-house for eight years from the 22nd of September, 1879, at the rent of £120.

The Plaintiff claimed before the arbitrator appointed under the Act compensation as for his interest under the lease of 1879. The local authority objected to the claim on the ground that *Mayou* had no right to grant the lease after the publication of the particulars; but the arbitrator proceeded, and awarded to the Plaintiff £950 as compensation. The local authority had since bought and had taken a conveyance of the interest of *Daniel Mayou* in the public-house, but refused to pay the £950 to the Plaintiff, or to give him a certificate under the Act. This action was brought by the Plaintiff claiming specific performance as of a contract to buy his interest for £950, or a *mandamus* to compel the Defendants, to deliver a certificate.

Barber, Q.C., and *P. Beale*, for the Plaintiff:—

The question is said to depend upon the wording of the statutes; but after the arbitrator has given his award there is no longer any question. It is said that the publication of the requisition is equivalent to a notice to treat under the *Lands Clauses Act*, but that is not so. The requisition is not served and may not have come to the notice of the party. Probably, here the Plaintiff has notice, but that does not affect the question. The whole question was raised before the arbitrator, and he considered himself bound to give compensation. *In re Marylebone Improvement Act* (1); *Carr* v. *Metropolitan Board of Works* (2). The Defendants did not pay *Mayou* on the footing that this lease was not valid, and have no doubt paid him the purchase-money on the footing of the lease being valid, and they now turn round and say it is invalid. There is no analogy between the *Dwellings Improvement Act* and the *Lands Clauses Act*, so far as the notice to treat is concerned. The local authority must, for instance, take all the land and cannot elect to take a part, and are not bound by this requisition as a railway company is bound by its notice to treat. No time is limited within which the land can be taken. Sect. 121 of the *Lands Clauses Act*, as to interests less than a year is not included in the *Improvement Act*. They are obliged to compensate all persons having an interest in the land taken.

(1) Law Rep. 12 Eq. 389. (2) 14 Ch. D. 807.

MATHEW, J. 1883 WILKINS v. MAYOR OF BIRMINGHAM.

Method (*Higgins*, Q.C., with him), for the Corporation :—

It is admitted that after a notice to treat under sect. 18 of the *Lands Clauses Act* no lease could be granted, and the requisition under the *Improvement Act* has exactly the same effect.

MATHEW, J. :—

The first question raised here is whether sect. 121 of the *Lands Clauses Act* is incorporated in the *Dwellings Improvement Act*, though it seems to me not material to be decided in the present case. The object of the Plaintiff is to establish his right to obtain compensation on the footing that he was a leaseholder for the term granted to him in 1879. He is not here to assert that he is entitled to be compensated on the footing that there was a nine months' interest in a lease which was unexpired before the second lease was granted, and when the scheme was first launched, but he is here to insist that he was entitled in 1879 to acquire a further leasehold interest, and that he is to be compensated for that. However, as the point has been raised, I think it right to express my opinion, and I consider that sect. 121 of the *Lands Clauses Act* is so incorporated. The reasons which apply to a railway company apply also, as it seems to me, to a public body like this. The principle is that neither a railway company nor a public body ought to be compelled to compensate for interests which are about to expire, and are so small as not to be deserving of the troublesome and expensive machinery for assessing compensation.

We then start with this fact, that the Plaintiff had up to the time when the second lease was granted, an interest which would expire in 1880, and was in 1879 practically a nine months' interest, not an interest greater than that of a tenant for a year mentioned in sect. 121. Then for what interest is he to be compensated? If it were the case of a railway company we should at once proceed to find out what his interest was at the time when the notice to treat was served. That notice requires any person supposed to have an interest in land to state the particulars of his interest. It has been held over and over again that from the time when the notice to treat has been served each party must abstain from altering his position. Any interest subsequently

acquired by or from the person on whom the notice to treat has been served is not a subject for compensation.

In dealing with this Act we have to see to what extent the *Lands Clauses Act* is incorporated with sect. 19 of the *Dwellings Improvement Act*. That section is framed in a very puzzling way. It runs thus: "The clauses of the *Lands Clauses Consolidation Act*, 1845, with respect to the purchase and taking of lands otherwise than by agreement shall not, except to the extent set forth in the schedule hereto, apply to any lands taken in pursuance of this Act, but, save as aforesaid, the said *Lands Clauses Consolidation Act*, 1845, and the *Lands Clauses Consolidation Acts Amendment Act*, 1860, as amended by the provisions contained in the schedule hereto, shall regulate and apply to the purchase and taking of lands in *England*, and shall for that purpose be deemed to form part of this Act in the same manner as if they were enacted in the body thereof."

I think it was meant that we should turn to the schedule and see how far the *Lands Clauses Act* was displaced by the schedule, and so far as it was not displaced it was intended that the *Lands Clauses Act* should be incorporated with the *Dwellings Improvement Act*. Now, in the schedule we find provisions for something closely analogous to the notice to treat. Those provisions are contained in sect. 6, sub-sect. (c) of the schedule. I do not propose to go through the sections of the Act with regard to which there has been no controversy, and which relate to the preliminary steps to be taken by the local authority up to the time when the confirming Act has been obtained. When that Act has been obtained the right of the local authority to take the land described in the scheme is finally established, and what is the next step which they are to take? Apparently they are in the position of a railway company which has acquired Parliamentary powers, their powers being to clear a certain area and for that purpose to acquire a right to it. Now when we refer to sect. 6, sub-sect. (c) of the schedule the next steps to be taken, so far as the owner of the property is concerned, are these. The local authority is to publish "a requisition directing the owners of or parties by this Act enabled to sell and convey or release any of the said scheduled lands, or any lands injuriously affected by the execution of the

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scheme of the local authority or any interest in such lands, to deliver to the arbitrator on or before a day fixed by the arbitrator and named in such requisition (and being a day not earlier than twenty-one days from the date of the insertion of the last of such notices), a short statement in writing of the nature of their respective claims."

That provision seems to me distinctly analogous to the provisions of the *Lands Clauses Act* with regard to a notice to treat. It is admitted in this case that the requisition was properly published, and on the 30th of August, 1879, any person interested in the property and minded to obey the order in the Act, would have been bound to send in a short statement in writing of the nature of the claim. The Plaintiff in this case might have sent in a claim in respect of the few months of his first lease which remained unexpired. But what he did was not to send in such a claim but to wait for some time, and in the month of October to acquire an interest in the property for seven years longer. He then went before the arbitrator for the purpose of having the value of his compensation assessed upon the footing that he was entitled to that leasehold interest. The local authority at once took the objection that the arbitrator had no power to deal with the case. The arbitrator dealt very sensibly with the objection by holding that it was one which went to his jurisdiction, that his duty was to assess the compensation on the footing that the interest in respect of which the claim was made did exist, and that he had not to decide the question of its existence. Accordingly he assessed the compensation on that footing. On this it has been contended that the arbitrator must be taken to have been empowered by the *Dwellings Improvement Act* to decide finally the question as to the right to compensation. I am of opinion that he had no such right. He had power only to deal with the amount of compensation, and the other question he left, and very properly did not deal with it in any way.

It is for me to deal with it, and I have come to the conclusion that the Plaintiff is not in any way entitled to the relief which he asks. He is not entitled to compensation on the footing that he had acquired this leasehold interest. It may be that the rights of the parties were concluded at an earlier period than that of the

notice contemplated by sect. 6 of the schedule, but at any rate, dealing as I best can with this somewhat complicated legislation, it appears to me that this section has a distinct analogy to the 18th section of the *Lands Clauses Act*, and that from the time of the publication of the requisition the parties were concluded.

I am of opinion that the Plaintiff has no such interest as that in respect of which he seeks compensation. This action therefore fails, and there must be judgment for the Defendants.

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Solicitors for Plaintiff: *Wright & Co.*, agents for *Hawkes & Weekes, Birmingham.*

Solicitors for Defendants: *Sharpe, Parkers, & Co.*, agents for *E. O. Smith, Birmingham.*

C. M.

C. A.
1883
V.-C. B.
July 19.
C. A.
Nov. 7, 14.

SEEAR *v.* WEBB.

[1883 S. 625.]

Practice—Motion—Affidavit of Service.

An order dismissing an action for want of prosecution was made subject to production of an affidavit of service, no one appearing for the Plaintiff. Shortly afterwards counsel appeared for the Plaintiff, but the Judge refused to have the case argued. No affidavit of service was sworn or filed until after the day on which the motion was made. The Registrar drew up the order on production of an office copy of an affidavit of service sworn and filed after that day, omitting in the order the date of the affidavit. It appeared that since the passing of the *Judicature Acts* the rule in *Lord Milltown* v. *Stuart* (1) had not been uniformly observed by the Registrars:—

Held, that, assuming the drawing up of the order on an affidavit sworn and filed after the day on which the motion was made to be irregular, the irregularity was not such that the Court ought on that ground to discharge the order.

ON the 10th of July, 1883, the Defendants gave notice of motion for the 13th, under Rules of Court, 1875, Order XXXVI., rule 4a, to dismiss the action for want of prosecution, and to vacate the registry of the action as a *lis pendens*. The motion was made before Vice-Chancellor *Bacon* by *Marten*, Q.C., on the 13th, almost immediately after the sitting of the Court, he not being aware that counsel had been instructed on the other side. The order was made subject to production of affidavit of service, no one appearing for the Plaintiff. Not long afterwards *C. H. Turner* appeared for the Plaintiff, and claimed to be heard on the ground that he was not aware that the motion would be made by *Marten*, Q.C., and that affidavit of service had not been produced. The Vice-Chancellor refused to hear the case, saying that the order which he had made must stand, and that it was the usual practice to bring in the affidavit of service afterwards. On attending to pass the order the Defendants' solicitor produced an affidavit of service sworn after the 13th, and filed on the 17th. The Plaintiff then obtained *ex parte* on the 18th of July, an order to stay the entry of the order of the 13th of July on the ground that an office

(1) 8 Sim. 34.

copy of affidavit of service had not been produced during the sitting of the Court. The order was drawn up referring to the affidavit of service, but not mentioning its date.

July 19. *W. Latham*, for the Defendants, now moved by leave on short notice to discharge the order of the 18th.

C. H. Turner, for the Plaintiff, submitted that the order of the 13th of July dismissing the action ought not to have been drawn up, as the affidavit of service of the notice of motion was not filed or produced before the rising of the Court on that day: *Lord Milltown* v. *Stuart* (1); Cons. Ord. XVIII. rule 5.

BACON, V.C. (after consulting with the Registrar), said that in his opinion the decision in *Lord Milltown* v. *Stuart* had no application to the modern practice. He was satisfied that the notice of motion had been duly served on the Plaintiff, and it was only necessary that an affidavit to that effect should be produced to the Registrar before drawing up the order. The order of the 18th of July must be discharged.

F. G. A. W.

C. A.

The Plaintiff appealed from the orders of the 13th and 19th, and the appeal was heard on the 7th of November, 1883.

Higgins, Q.C., and *C. H. Turner*, for the appeal:—

The *Judicature Act*, 1875, sect. 21, preserves the old practice where not altered by or inconsistent with the Acts or Orders. The old practice was perfectly settled that an affidavit of service must be produced in Court before the Court rose: *Lord Milltown* v. *Stuart;* and there is nothing in the Acts or Rules to alter the practice. The order, therefore, ought to be discharged for irregularity.

Marten, Q.C., and *W. Latham*, for the Defendants:—

The Registrars consider that the old practice has been relaxed in this respect, and that it is not now necessary to have an affidavit of service ready on the day. It has since the passing of

(1) 8 Sim. 34.

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the *Judicature Act* been usual to draw up these orders on production of an affidavit of service sworn and filed on a later day, the order either omitting the date of the affidavit or being itself post-dated. The old practice was very inconvenient, for it obliged the party moving always to have an affidavit of service ready unless he knew that the party served would appear, and if he did appear the expense of the affidavit was thrown away. There was no substance in the rule, it was established on the ground, which no doubt was technically correct, that an order ought not to be made unless the party applying for it has evidence to justify it. The substance, however, is all the other way, for it can be of no consequence whether an affidavit of service is made on the day of the motion or a week afterwards.

[COTTON, L.J.:—How can you maintain this order when within an hour after it was made Mr. *Turner* came into Court and stated that he was instructed.]

We can sustain the order on the merits, but affidavits have been filed which we ought to have an opportunity of answering. Mr. *Turner's* appearance on the day waives service of the notice.

Higgins, in reply:—

Mr. *Turner* was not heard, and he might merely have heard *aliunde* that the motion was made, and there was nothing to dispense with proof of service.

COTTON, L.J.:—

We will take time to consider whether the order ought to be discharged for irregularity without entering into the merits, or whether the case ought to be decided on the merits.

Nov. 14. COTTON, L.J.:—

The question for our decision is whether the Appellant is entitled to have an order dismissing his action for want of prosecution set aside on the ground of irregularity without regard to the merits. The question arises under the following circumstances: The counsel who was instructed on behalf of the Defendants to move for the order on the 13th of July was not

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aware that counsel had been instructed on the other side, and he took the order subject to the production of an affidavit of service, *i.e.*, subject to proving that the Plaintiff had been duly served with notice of the motion. The irregularity which is alleged is this. The Defendants had no affidavit of service in Court at the time when the motion was made, and no such affidavit was filed or sworn until after that day. It is urged that this is an irregularity sufficient to induce the Court to discharge the order. The order as it was drawn up is certainly not in accordance with the old practice of the Court of Chancery, which required that an office copy of the affidavit of service should be produced in Court, or at any rate produced to the Registrar, before the rising of the Court on the day on which the motion was made. Probably production to the Registrar was considered equivalent to production in Court. When the case was before us last week we thought that it would be desirable to consult our colleagues, some of whom were absent on circuit, as to what ought to be the practice in such cases for the future. But we have not thought it necessary to do this before giving our judgment in the present case. The Registrar has furnished us with a note which shews that since the *Judicature Act* came into operation there has been a great diversity in the practice in this matter. Some of the Registrars have followed the old Chancery practice; others have admitted an affidavit sworn after the day on which the motion was heard, and have either inserted it in the order without any date, or have post-dated the order. We think it will be right for the Court to decide, either by General Order, or by a direction to the Registrars, what the practice in future is to be. But, assuming that it was irregular for the Registrar to draw up the order as he did in the present case, yet I think it was not such an irregularity that the order ought to be set aside because of it. That there was due service of the notice of motion on the Plaintiff is not disputed, and his counsel was in Court in consequence of the notice a short time after the motion had been made. We think that, even if it was irregular in the officer to draw up the order upon the affidavit which was produced, it was not a substantial irregularity, for no injury was done to the Plaintiff, he having been

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duly served with notice of the motion. We must hear the appeal on its merits.

LINDLEY, L.J. :—

It appears that the old practice in Chancery was settled in the year 1837 in the case of *Lord Milltown* v. *Stuart* (1). There it is stated that "the Vice-Chancellor said that he had conferred with the Lord Chancellor, and that his Lordship had decided that where an application to the Court was made either by motion or petition, and the opposite party did not appear, no order ought to be drawn up, unless the affidavit of service of the notice of the motion or of the petition were filed, at the latest, before the rising of the Court on the day on which the application was made." Ever since that decision down to comparatively recent times that has been the practice; and it is familiar to us all that the Registrars used to decline to draw up orders taken in the absence of the Respondent unless the affidavit of service was filed before the rising of the Court on the day on which the order was made. I have, however, searched in vain for any case in which an order drawn up by the Registrar not in accordance with this practice has been set aside by the Court. It is well known that the practice did not prevail in the Common Law Courts, and the note with which we have been supplied by the Registrar shews that it has been often departed from in the Chancery Division since the *Judicature Acts*. Since those Acts it has not been the invariable practice to refuse to draw up an order made in the absence of the Respondent, simply because the affidavit of service has not been filed on the day on which the order was made, and I think it would be wrong to set aside the present order simply on that ground. We will consider what ought to be the rule for the future, but it is sufficient to say now that the order ought not to be set aside merely for non-compliance with a practice which has not of late been consistently followed.

Solicitors: *Reader & Hicks; F. Heritage & Co.*

(1) 8 Sim. 34.

H. C. J.

In re FLAVELL.
MURRAY *v.* FLAVELL.

[1883 F. 134.]

C. A.
1883
NORTH, J.
Aug. 6, 7.
C. A.
Nov. 14.

Contract for Benefit of Third Party—Right to enforce—Trust—Partnership Articles—Covenant to pay Annuity for Benefit of Widow of deceased Partner.

Articles of partnership between two solicitors provided that the partnership should be for the term of ten years from the 1st of May, 1875, if both the partners should so long live. The partnership was also made determinable by notice. There was a further provision that from the determination of the partnership the retiring partner, his executors or administrators, or the executors or administrators of the deceased partner, should be entitled to receive out of the net profits of the partnership business, during so much (if any) of the term of five years from the 1st of May, 1880, as should remain after the determination of the partnership, the yearly sum of £350, and during so much (if any) of the term of five years from the 1st of May, 1885, as either the retiring partner, or a widow of the retiring or deceased partner, should be living, the yearly sum of £250, any sum which might under this provision for the time being become payable to the executors or administrators of a deceased partner to be applied in such manner as such partner should by deed or will direct for the benefit of his widow and children, and in default of such direction to be paid to such widow, if living, for her own benefit. It was further provided that the annuity should, so far as legally might be, be constituted a charge on the net profits of the business. One of the partners died in 1883, leaving a widow, but without having given any direction as to the application of the annuity. By his will he appointed his widow his universal legatee and sole executrix. He died insolvent, and an action was brought by a creditor to administer his estate :—

Held, by *North*, J., and by the Court of Appeal, that the annuity did not form part of the testator's estate, but that by the articles a trust of it was created in favour of the widow, and that she was entitled to it free from the claims of the testator's creditors.

THIS was a creditor's action for the administration of the real and personal estate of *T. W. Flavell*, who died without issue on the 7th of January, 1883. The Defendant was his widow, and she was his sole executrix. On the 24th of May, 1883, an administration judgment was pronounced, and a receiver was appointed of the rents and profits of the testator's real and leasehold estate, and to get in his outstanding personal estate.

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The testator was a solicitor, and he carried on business in partnership with *J. F. Bowman*, under the provisions of articles of partnership dated the 6th of July, 1875. The partnership was to be for the term of ten years from the 1st of May, 1875, if both the partners should so long live.

Clause 3 of the articles provided for the determination of the partnership by notice.

Clause 35 provided that "From the determination of the partnership the retiring partner, his executors or administrators, or the executors or administrators of the deceased partner, shall be entitled, in addition to the moneys payable under the last preceding article, to receive out of the net profits of the partnership business such yearly sums as hereinafter provided during such periods as hereinafter mentioned (that is to say) . . . and during so much (if any) of the term of five years from the 1st of May, 1880, as shall remain after the determination of the partnership, if the retiring or deceased partner shall be the said *J. W. Flavell*, the sum of £350, and if the retiring or deceased partner shall be the said *J. F. Bowman* the sum of £250, and during so much (if any) of the term of five years from the 1st of May, 1885, as either the retiring partner or a widow of the retiring or deceased partner shall be living, if such partner shall be the said *J. W. Flavell*, the sum of £250, and if such partner shall be the said *J. F. Bowman* the sum of £150 . . . any yearly sum which may under this present article for the time being become payable to the executors or administrators of a deceased partner to be applied in such manner as such partner shall by deed or will direct for the benefit of his widow and children or child (if any) or any of them, and in default of such direction to be paid to such widow, if living, for her own benefit, or, if not living, then to the guardian or guardians for the time being of such children or child for the benefit of such children or child."

By clause 36 "the yearly sum payable under the last preceding article shall, so far as legally may be, be constituted a charge upon the net profits of the partnership business."

By his will, dated the 26th of September, 1845, *Flavell* devised and bequeathed all his real and personal estate to his wife, her heirs, executors, administrators, and assigns, for ever, subject to

the payment of his debts and funeral and testamentary expenses. He did not in any way by deed or will direct how the annuity payable to his executors or administrators under the above provisions of the partnership articles was to be applied, unless the will was to be construed as giving such a direction. After his death the question arose whether the annuity thus payable to his executrix formed part of his assets, or whether she was beneficially entitled to it. This summons was taken out by the widow, asking that the receiver might be at liberty to pay the annuity to her for her own use and benefit so long as the same should remain payable or until further order.

The summons came on for hearing before Mr. Justice *North* on the 6th of August, 1883.

Cozens-Hardy, Q.C., and *Byrne*, for the summons :—

The provisions of the articles relating to the annuity were in the nature of a settlement by *Flavell* for the benefit of his wife and children by means of a bargain between himself and his partner as to the mode in which the joint assets should be dealt with. It may be that the agreement could have been released if the partnership had been dissolved, but that has not been done. But even then *Bowman* might have insisted on paying the annuity to the widow. A trust is created, and it is not like the case of a covenant entered into for the benefit of a third party, the performance of which the third party cannot enforce: *In re Empress Engineering Company* (1).

[NORTH, J., referred to *Lloyd's* v. *Harper* (2).]

Bowman has covenanted to pay the annuity in this way, and payment to the widow would be a perfectly good discharge to him.

Warmington, Q.C., and *J. R. Brooke*, for the Plaintiff :—

The annuity is payable to the executors or administrators of the deceased partner; they could take it only as representing him. It is said that the widow is alone beneficially entitled, but there is no evidence that the agreement was ever communicated to her. It is admitted that *Flavell* could have released

(1) 16 Ch. D. 125. (2) 16 Ch. D. 290.

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the agreement in his lifetime. That is inconsistent with the existence of a trust for the widow. No one but the person beneficially entitled can release a trustee. The effect of the articles is merely to give *Flavell* a right to dispose by will of an interest in the business: *Ponton* v. *Dunn* (1).

[NORTH, J.:—In that case the testator had reserved to himself a general power of disposition. That is not so in the present case.

Cozens-Hardy, Q.C., referred to *Page* v. *Cox* (2).]

This is a mere bargain between the testator and his partner; no trust for the widow was constituted, and she cannot enforce an agreement for her benefit to which she was not a party, and which was not communicated to her: *Colyear* v. *Countess of Mulgrave* (3); *In re D'Angibau* (4); *Richards* v. *Delbridge* (5).

Byrne, in reply:—

The agreement in the articles created a trust in favour of the widow: *Page* v. *Cox*. At any rate the appointment of the widow as executrix completed the voluntary settlement and clothed her with the legal estate, and consequently the difficulty which arose in *In re D'Angibau* does not arise here.

NORTH, J. (after referring to the provisions of the partnership articles and stating the other facts), continued:—

The testator's estate is insufficient for the payment of his debts, but there is no suggestion that the articles were in any way intended to defeat or delay his creditors. The widow claims the annuity which is now payable under the articles. The testator's will contains no express direction as to its payment. The testator's creditors resist this claim, and allege that the annuity forms part of the testator's estate. It seems to me that, if the widow is entitled to the annuity at all, she is entitled to it in priority to the creditors. If the creditors are entitled to it in priority to her this can only be, I think, on the basis that

(1) 1 Russ. & My. 402.
(2) 10 Hare, 163.
(3) 2 Keen, 81.
(4) 15 Ch. D. 228.
(5) Law Rep. 18 Eq. 11.

she would not be entitled to it at all, however solvent the testator's estate might be. Of the cases which have been cited the one most like the present case is *Page* v. *Cox* (1). There a trader bequeathed his residuary estate, including his stock-in-trade, to trustees, on certain trusts for the benefit of his wife, her sister, and another person. After the date of the will he entered into partnership, and the articles of partnership contained a proviso that, if the testator should die during the partnership, leaving a widow surviving him, such widow might, if she should think fit, continue to carry on the business with the surviving partner, and should be entitled to the testator's share of the profits, and of the property of the partnership. The testator died, leaving his widow surviving him, and it was held that the effect of the articles was to take the testator's share of the business entirely out of the provisions of the will, and that the widow was entitled to that share. Vice-Chancellor *Turner* said (2), "The effect of the clause" (in the articles) "cannot, I think, be stated lower than that it was an agreement by both parties, that, upon the death of either of them, his share should be dealt with according to the provisions which the clause contains. We have to consider then what is the effect of such an agreement. Is it not to create an obligation in equity upon the surviving partner, in whom the legal interest would be, and was contemplated as being, vested; and in what respect does such an obligation differ from a trust? I see no difference between them; and I am of opinion, therefore, that, in the event which happened, these articles created a trust in favour of the widow; and I have less difficulty in so holding, as I consider it to be now settled, in *Kekewich* v. *Manning* (3), that, in cases of this nature, the Court is to regard the substance and effect and not the mere form of the instrument; and that a trust may well be created, although there may be an absence of any expression in terms importing confidence. It was argued that this was a mere case of contract between two persons for the benefit of a third party, and that the third party could not enforce such a contract, and *Colyear* v. *Countess of Mulgrave* (4) was cited upon that point. But it seems to have been considered in

(1) 10 Hare, 163.
(2) Ibid. 168.
(3) 1 D. M. & G. 176.
(4) 2 Keen, 81.

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Kekewich v. *Manning* (1) that that case was not free from doubt; and, at all events, I think it is distinguishable from the present case. . . . . A trust certainly cannot be the less capable of being enforced because it is founded on contract." The difference between that case and the present is this, that there the testator's share of the partnership business and assets was to go to his widow, while here there is an agreement by the surviving partner to pay the widow an annuity which is to be a charge on the partnership assets. It is said that *Ponton* v. *Dunn* (2) is at variance with *Page* v. *Cox* (3). In *Ponton* v. *Dunn* there was a stipulation in a partnership deed that the testator's interest should after his death and during the term of partnership go to such persons as he should by will name or appoint, and in default of appointment to his wife; if she should be dead, to his surviving children, in equal shares, and in case of the death of all his children, to his executors or administrators. By his will he, without alluding to the partnership deed, gave all his estate and effects to one of his children, and it was held that his interest in the partnership passed by the bequest. Sir *John Leach*, M.R., said (4), "It is true the words 'name and appoint' are used in the deed; but, considering the relation of the parties, I cannot understand them to be used with a view to create a power of appointment in its technical sense, and to limit the testator's power of disposition by will over this part of his property. Without this stipulation, those who claimed through him would have had no title to share in the partnership profits after his death; and it is a mere bargain with his partner that he should have a power of disposition by will, and, if he died without a will, that the property should devolve to his family in the manner stated. This property will, therefore, pass under the description in his will of 'all other his estate and effects of whatsoever nature or description.'" When that case is closely looked at it is clear that all that was decided was this, that, although the words "nominate and appoint" were used in the deed, the use of those words was not essential to the validity of an exercise of the power of disposition given, and that the power was well exercised though

(1) 1 D. M. & G. 176.
(2) 1 Russ. & My. 402.
(3) 10 Hare, 163.
(4) 1 Russ. & My. 406.

the will contained no reference to the power or to the subject of it. It is clear that the Master of the Rolls recognised the provisions of the deed in favour of the testator's family as good, and held they were rendered nugatory only because the power of appointment was carried into effect by the terms of the will. The decision in *Page* v. *Cox* (1) is rather put on the ground that there was a trust for the benefit of the widow, and that view of it is taken by Lord Justice *Lindley* in his book on Partnership (2). I have already noticed the distinction between *Page* v. *Cox* and the present case, and the question is whether that distinction really makes any difference. The first case referred to on that point is *In re Empress Engineering Company* (3). There *A.* and *B.* had agreed with *C.* on behalf of an intended company that *A.* and *B.* should sell, and the company should buy a certain business, and it was a term of the agreement that sixty guineas should be paid to *Jones & Pride*, solicitors, for their expenses and charges in registering the company. The memorandum of association of the company which was subsequently formed adopted this agreement, and the directors afterwards ratified it. In the winding-up of the company it was held that the agreement had never been made binding on the company, and that, even if it had, *Jones & Pride*, not having been parties to the contract between *A.* and *B.* and the company, could not proceed against the company for the sixty guineas. During the argument *Jessel*, M.R, said (4), "If you can make out that *Jones & Pride* are *cestuis que trust*, that alters the case. It appears to me that they are not. The promoters were liable to *Jones & Pride*, who are simply their creditors. *A.* being liable to *B.*, *C.* agrees with *A.* to pay *B.* That does not make *B.* a *cestui que trust*." The case of *Gregory* v. *Williams* (5) was relied on there in support of the claim, and *Jessel*, M.R. (6), said that the agreement there was that the defendant would, "out of the produce" of certain property pay what was due by *Parker* to *Gregory* on a promissory note, and apply the residue, so far as it would extend, in satisfaction of the defendant's own demand, and pay the surplus (if any) to *Parker*. "It was a parol

(1) 10 Hare, 163.
(2) 4th Ed. vol. ii. pp. 851, 852.
(3) 16 Ch. D. 125.
(4) 16 Ch. D. 127.
(5) 3 Mer. 582.
(6) 16 Ch. D. 128.

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agreement part performed, and it created a trust of property," and in his judgment *Jessel*, M.R., said (1), "It is then contended that a mere contract between two parties that one of them shall pay a certain sum to a third person not a party to the contract will make that third person a *cestui que trust*. As a general rule that will not be so. A mere agreement between *A.* and *B.* that *B.* shall pay *C.* (an agreement to which *C.* is not a party either directly or indirectly), will not prevent *A.* and *B.* from coming to a new agreement the next day releasing the old one. If *C.* were a *cestui que trust* it would have that effect. I am far from saying that there may not be agreements which may make *C.* a *cestui que trust*. There may be an agreement like that in *Gregory* v. *Williams* (2), where the agreement was to pay out of property, and one of the parties to the agreement may constitute himself a trustee of the property for the benefit of the third party." And Lord Justice *James* said (3), "I think it is perhaps as well that we should say that *Gregory* v. *Williams* seems to be misunderstood. When that case is considered with the careful criticism with which the Master of the Rolls has examined it, it appears quite clear that there was there a transfer of property with a declaration of trust in favour of a third person, which was a totally different thing from a mere covenant to pay money to that person." This shews how near a mere agreement may come to a declaration of trust. The Lord Justice afterwards said (4), "I may add, as the Master of the Rolls pointed out to me in the course of the argument, that in *Gregory* v. *Williams* the man with whom the contract was made was one of the plaintiffs, and the only defence there would have been misjoinder of plaintiffs, and that is a defence which the Court was not likely to view with much favour." The same subject was again very fully considered in *Lloyd's* v. *Harper* (5), in which a father, on the occasion of his son being admitted as an underwriting member of the association known as *Lloyd's*, gave a guarantee to the managing committee of the association by which he held himself responsible for all his son's engagements in that capacity. The associa-

(1) 16 Ch. D. 129.
(2) 3 Mer. 582.
(3) 16 Ch. D. 129.
(4) Ibid. 130.
(5) 16 Ch. D. 290.

tion, in whom the rights of the committee had become vested by statute, sixteen years after the date of contract sought to enforce the guarantee for the benefit of the persons, whether members of *Lloyd's* or not, with whom the son had contracted engagements as an underwriting member, he having become a bankrupt, and it was held that the plaintiffs were entitled so to do. It is clear that the association were not nominees on behalf of the persons who were to benefit by the guarantee, and moreover they entered into the contract for the benefit of persons who were not in existence at the date of the contract. The point was taken that, assuming that *Lloyd's* were entitled to sue on the guarantee at all, the utmost which they could recover was nominal damages, because the association had not sustained any loss, the loss having been sustained by the persons who had entered into the contracts with the son. Lord Justice *James* said (1), "The defendants say, 'You, *Lloyd's*, have sustained no loss, and can only recover nominal damages, because you can only recover for your own loss, and not for the losses sustained by other persons.' That might be true if *Lloyd's* were not trustees, but I am of opinion that Mr. Justice *Fry* was well warranted in the conclusion at which he arrived, that the engagement was made with the committee as trustees for and on behalf of the persons beneficially interested. That brings the case within the authorities, of which there are more than one, viz., *Gregory* v. *Williams* (2), *Lamb* v. *Vice* (3), and many other cases which proceed on the obvious principle that, if *A.* is trustee for *B.*, *A.* can sue on behalf of *B.*" Lord Justice *Cotton*, in giving judgment to the same effect, referred also (4) to *Tomlinson* v. *Gill* (5), and said that the principle there laid down by Lord *Hardwicke* "is, I think, a good and sound one, and one upon which we can properly act, and are bound to act in the present case, treating the plaintiffs, *Lloyd's*, as trustees for those for whose benefit this contract was entered into." And Lord Justice *Lush* said (6), "I consider it to be an established rule of law that where a contract is made with *A.* for the benefit of *B.*, *A.* can sue on the contract for the benefit of *B.*, and recover all that *B.* could

(1) 16 Ch. D. 315.
(2) 3 Mer. 582.
(3) 6 M. & W. 467.
(4) 16 Ch. D. 317.
(5) Amb. 330.
(6) 16 Ch. D. 321.

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have recovered if the contract had been made with *B.* himself." There is one further observation to be made on that case, viz., that *West* v. *Houghton* (1) was cited in the argument. In that case the lessee of sporting rights over an estate covenanted with the lessor to keep down the rabbits on the estate, so that no appreciable damage might be done to the crops, and it was held that the lessor, being under no obligation to compensate the farming occupier for damages to the crops, and not being a trustee for him, could not recover more than nominal damages for the breach of the covenant. My reason for referring to that case is this, that both Lord Justice *James* and Lord Justice *Cotton* (2) intimated an opinion that that decision could not be supported. If then *West* v. *Houghton* ought to have been decided the other way, it would shew that the person who had really sustained damage by the game might sue the lessee through the landlord as his trustee. This case of *Lloyd's* v. *Harper* (3) appears to me to go far enough to shew that in the present case the widow, the person for whose benefit the covenant to pay the money was really entered into, is entitled to sue the Defendant upon it.

But it is said that she is a mere volunteer, and for this purpose *In re D'Angibau* (4) is relied upon. There, by a settlement made on the marriage of a lady who was then an infant it was agreed that certain personal estate standing in the names of the trustees of her father's will, in which she would on her marriage take a vested interest, subject to an annuity for her mother's life, should be assigned after the marriage to the trustees of the settlement, on trust to pay the income to the wife for her life, for her separate use, and after her death to her husband till bankruptcy or alienation; then to hold the capital on trusts for the issue of the marriage, and in default of issue (subject to the previous trusts) on trust as the wife should by deed or will appoint, and in default of appointment on trust, in case the husband should survive the wife, for her next of kin, exclusive of the husband. The wife died without issue, being still an infant, having by deed appointed the fund to her husband. The fund, which was still standing in the names of the trustees of the

(1) 4 C. P. D. 197.
(2) 16 Ch. D. 311.
(3) 16 Ch. D. 290.
(4) 15 Ch. D. 228.

father's will, was claimed by the trustee in the liquidation of the husband (the trustee being also the personal representative of the wife), and by the next of kin of the wife, on the ground that she being an infant was incapable of exercising the power of appointment, and that the appointment was, therefore, void. *James* and *Brett*, L.JJ. (*Cotton*, L.J., dissenting), held (affirming the decision of *Jessel*, M.R.), that the appointment was valid, but the whole Court held that, whether it was valid or not, the wife's next of kin, being volunteers, could not claim under the settlement in opposition to her legal personal representative. That decision is relied on by the testator's creditors in the present case. Lord Justice *Cotton* said (1), "The fund in question has never come into the hands of the trustees of the settlement, and the plaintiff contended that he as legal personal representative of the deceased, has a legal title to the fund; that the contention of the defendants in support of their demurrer must be based on this, that the Court at their instance will, as against the plaintiff's legal title, enforce the settlement; and the plaintiff contends that this it will not do, because the settlement contains no declaration of trust on the part of the husband, and is merely a covenant by him to make a settlement, and that the demurring defendants must be considered as volunteers, and that the Court will not at the instance of the demurring defendants enforce the contract to make a settlement against the legal title of the plaintiff. I am of opinion that the plaintiff's contention on this point is correct." In other words, the plaintiff had the legal title; the defendants desired to set up a title under an imperfect voluntary settlement. *Brett* and *James*, L.JJ., entirely agreed with *Cotton*, L.J., on this point. The present case is an entirely different one. There is no doubt that the executrix could sue *Bowman* upon his covenant if he refused to pay; her claim arises under the partnership articles, and he would have no answer to an action by her for the annuity: quite apart from the question what would become of it after she had recovered it, whether it would form part of the testator's estate or whether it would belong to her beneficially. If so there is nothing remaining to be done to recover the fund; she has the legal title and the fund is in her hands. The only

(1) 15 Ch. D. 241.

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question is, to whom does it belong beneficially? Why should not the widow have it? The articles of partnership say it is to be hers, and cases like *In re D'Angibau* (1) have no application where the beneficial claimant is also the legal owner as the legal personal representative of a person who was not a volunteer. The observations of the late Master of the Rolls in *Strong* v. *Bird* (2) are also much to the point. The widow as executrix has received the money and it is in her hands. How is it to be applied? It appears to me that I cannot say that the express words of the articles are to go for nothing. The agreement was never released or given up by the testator in his lifetime, and I think the widow is entitled to the charge which she claims.

W. L. C.

C. A.

The Plaintiff appealed, and the appeal was heard on the 14th of November, 1883.

Warmington, Q.C., and *J. R. Brooke*, for the appeal :—

This annuity under clause 35 is payable to the creditors or administrators of a deceased partner, and if there is any trust at all, it is only a voluntary trust which the Court will not enforce against creditors.

[COTTON, L.J. :—The question is whether the money comes to the hands of the executors or administrators impressed with a trust, or whether they take it as part of the estate of the deceased.]

It only comes to this, that *Flavell* has covenanted that his executors shall deal with part of his assets in a particular way. The person to take the benefit of that covenant is a volunteer, unless he comes within the consideration of the deed. It would be dangerous to hold that a person can withdraw a part of his assets from his creditors, by covenanting that his executors shall deal with it in a particular way. *Flavell* could have released this covenant, and he who is *dominus* of the covenant is *dominus* of its proceeds. Mr. Justice *North* applied *Page* v. *Cox* (3), but

(1) 15 Ch. D. 228. (2) Law Rep. 18 Eq. 315.
(3) 10 Hare, 163.

that case is quite distinguishable. The Court there held that on the true construction of the articles the surviving partner was a trustee for the widow. Here the money is to come to the hands of the personal representatives of *Flavell*, and if there is any trust at all, the personal representative and not the surviving partner is the trustee. In *Colyear* v. *Countess of Mulgrave* (1), it was decided that a volunteer cannot come to enforce a trust which rests only in contract. Mr. Justice *North* doubts that, but the doubt detracts from his judgment, for the doctrine of *Colyear* v. *Countess of Mulgrave* was affirmed in *In re D'Angibau* (2).

[COTTON, L.J. :—Do you say that, not releasing the covenant but letting it stand, *Flavell* could alter the destination of the money ?]

Yes, for value.

[COTTON, L.J. :—An annuity being made payable to his executors for certain purposes, how can he alter its destination ?]

We say that he can, because it represents part of his interest in the business. This covenant is part of the consideration for the share *Bowman* took in the business, and the annuity therefore was *Flavell's* property. The disposition in favour of the widow and children has all the incidents of a legacy. There is no agreement to pay the annuity out of any property of which *Bowman* can be considered to have made himself a trustee, there is therefore no complete trust.

Cozens-Hardy, Q.C. and *Byrne, contrà*, were not called upon.

COTTON, L.J. :—

The contention of the Appellant is that when the annuity payable under the 35th of the articles of partnership comes to the hands of the personal representative of *Flavell* it forms part of *Flavell's* estate, and is not trust property which comes to the hands of the representative impressed with a trust. If it is trust property, it is not liable to payment of *Flavell's* debts, nor payable to the receiver.

The 35th article provides for two events, determination of the

(1) 2 Keen, 81. (2) 15 Ch. D. 228.

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partnership by retirement, and determination of it by death. The latter event is the one which has happened. In the first event the annuity is payable to the retiring partner, in the second to the executors of the deceased partner. How, then, do they take it? Subject to a direction that it shall be applied for the benefit of the deceased partner's widow and children. The executrix is not claiming anything which was payable to her husband during his life, but it is contended that what she receives is part of his property, and therefore subject to his debts and liabilities. But how is it made out to be his property? It is said that he could have released the covenant. But if he could have done so, it would only be on the ground that the 35th article did not create a trust, but was only a contract between the partners to create a trust; a contract from which either could release the other. It is said that the widow is a volunteer, and that the Court will not assist a volunteer. I do not decide that she is a volunteer, but I will assume that she is. During the argument I put this case to the Appellant's counsel, "Do you say that Mr. *Flavell* could have altered the destination of this fund when it came to the hands of the executors." He replied, yes; but I am of the contrary opinion, for this reason, that the fund came to the hands of the executors impressed with a trust; and not merely subject to a direction given by Mr. *Flavell*, which he could have altered by a contract for value. I do not say that he could have done so even if this had been property of his own which he had impressed with a trust. It is said that Mrs. *Flavell* was a volunteer, but I never heard that a *cestui que trust* is precluded from suing his trustee by being a volunteer. The question is, what are the rights of the widow as against the personal representative, or rather what are her rights as widow against what is paid to her under art. 35 as personal representative. It appears to me that it came to her impressed with a trust, and that there is no ground for saying that it forms part of Mr. *Flavell's* assets.

I by no means favour the view that if this had been a part of Mr. *Flavell's* own property of which he declared a trust by the articles, the Appellant could succeed. No question can be raised as to his having any intention to defraud creditors, and a

voluntary trust of personalty is as good as any other. I do not, however, put the case on that ground, but on the ground that this never was a part of the testator's estate, but came to the hands of his representative impressed with a trust for his widow and children.

LINDLEY, L.J.:—

The document with which we are dealing is not a fraudulent deed, nor even a voluntary deed, but an instrument embodying an honest bargain for value between the partners. Why then should not full effect be given to its terms? It is suggested that this is a legacy, but I never heard of giving a legacy by such a deed. Then it is said that this is a voluntary settlement. Suppose it was, a settlement is not bad because it is voluntary. It was urged that a man cannot in this way exempt his assets from payment of his debts. The answer is, that this never was a part of Mr. *Flavell's* assets.

Solicitors: *Wray & Philips; R. A. Kelley.*

H. C. J.

In re ROTHERHAM ALUM AND CHEMICAL COMPANY.

Company—Articles of Association—Costs of Formation of Company—Claim by Solicitor of Promoter against the Company.

M. employed *P.* as solicitor in the formation of a limited company for the purpose of taking over *M.'s* business. The company was formed, and the articles provided that all expenses incurred about the formation of the company should be paid by the company. After the company was formed *P.* acted as its solicitor, and *M.* was one of the directors. At a meeting of the directors, at which *M.* was present, *P.* asked for payment of his costs incurred about the formation of the company, and a conversation took place tending to shew that the company would undertake to pay them, but nothing appeared on the minutes. At a subsequent meeting a resolution was passed on the proposal of *M.* that a cheque for £39 should be given to *P.* in discharge of a certain part of these costs. The company having been ordered to be wound up, *P.* carried in a claim for his bill of costs, which was referred to the Taxing Master. The Taxing Master disallowed all items incurred before the formation of the company, and *Bacon*, V.C., refused to disturb his decision. *P.* appealed:—

Held, that *P.* could not maintain his claim on the ground that the

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company having had the benefit of his services was bound to pay for them, as his services had been rendered on the retainer of *M.*

In re Hereford and South Wales Waggon and Engineering Company (1) considered.

Held, further, that *P.* could not maintain his claim on the ground of novation, the conversation at the first meeting not being supported by anything in the minutes, and the subsequent giving of the cheque being capable of being referred to the obligation of the company to indemnify *M.* against the costs incurred in its formation, and so not being sufficient evidence of an agreement by the company with *P.* to pay him.

IN 1881 *J. H. Mycock* was carrying on alum and chemical works at *Rotherham* on freehold property of his own. In that year some persons agreed to form a limited company for purchasing and carrying on the works, and the company was registered under a memorandum and articles on the 14th of September, 1881. The subscribers of the memorandum and articles were *Mycock* and six other persons. By the 64th article it was provided that the directors "shall pay all expenses incident to the formation of the company," and by article 65 (*c*) they were authorized "to agree with the said *J. H. Mycock* for the purchase of the business, works, goodwill, stock, and other the premises in the memorandum of association mentioned, subject to such exceptions, conditions, mortgages, or charges, and at such price and upon such terms as they shall think fit, and to do all acts to carry into effect such agreement."

Mr. *James Peace* acted as solicitor for *Mycock* in the negotiations which resulted in the formation of the company, and in arrangements with his mortgagees which were requisite in order to enable him to carry out a sale to the company. After the formation of the company a written agreement between *Mycock* and the company for the sale to the company was finally settled and approved, but was not executed, owing to the accounts of the mortgagees not being settled, and it never was executed. The company, however, took possession of the property on the 1st of October, 1881. The 16th clause of the agreement provided that the company's costs of the several assurances and documents necessary or proper for giving effect to the agreement and for vesting the estate and interest of the vendors in the purchased

(1) 2 Ch. D. 621.

property in the company, and all preliminary and other costs, charges, and expenses whatsoever of and incidental to obtaining the valuations of the property, and of and incidental to the formation and regulation of the company and transferring the business, should be considered as incurred and paid, or payable, by the company.

Mr. *Peace* deposed that a meeting was held on the 27th of February, 1881, at which the subscribers of the memorandum and articles were present, and that the above agreement was there discussed clause by clause, and the following resolutions passed:—

"That under the arrangement come to with Mr. *J. H. Mycock* the company takes to the business and works on the 1st day of October, 1881. That the agreement with Mr. *Mycock* be, and the same is hereby ratified and confirmed."

Mr. *Peace* went on to say,—"I called the attention of the company, which was represented by the persons present at that meeting, and who were the signataries to the memorandum and articles of association, that no promotion money had been paid to any person, and that the whole costs of formation were limited to my bill of costs and disbursements as a solicitor. This was accepted in its entirety without a dissentient voice. I especially directed attention to the question of the payment of these costs, and pointed out that they must be recognised, otherwise I could not be a party to allow the company to pay over all the purchase-money they had agreed to pay Mr. *Mycock* without providing for the costs incurred, when the chairman of the meeting and the largest contributory called attention to the fact that they were all agreed the company would pay these costs, and that I could look to the company for them."

The minutes contained a record of various resolutions passed at this meeting, but they contained no mention of Mr. *Peace's* costs of the formation of the company.

Mr. *Peace* on the 25th of October, 1881, wrote to *Mycock*, who had been appointed managing director, asking for a cheque for £100 on account in respect of his costs and disbursements incident to the formation of the company. This was not sent, and at a meeting on the 21st of November, 1881, Mr. *Peace* renewed his

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request for a cheque on account, but, as he deposed, the directors desired him not to ask for a general cheque on account, but stated that any specific payments he had made should be reimbursed, and asked him to allow the general costs to stand over till he could say that all negotiations were closed and the deeds ready for signature. At another meeting on the 21st of December, 1881, Mr. *Peace* mentioned that he had a specific payment of £39 4*s.* 6*d.* to make to the printer for the memorandum and articles of association. A resolution was proposed by *Mycock*, and carried, that a cheque for this amount should be signed and given to Mr. *Peace*, which was accordingly done.

An order having been made for winding up the company, Mr. *Peace* carried in a claim as creditor for his bill of costs and disbursements. The Chief Clerk referred the bill to the Taxing Master, who taxed off all the items prior to the 15th of September, 1881. Vice-Chancellor *Bacon* refused to disturb this decision, and Mr. *Peace* appealed.

Marten, Q.C., and *Swinfen Eady*, for *Peace*:—

There was an agreement between the promoters and the company that all the costs of the formation should be paid by the company.

[COTTON, L.J.:—That would entitle the promoter to call on the company to repay him what he paid to the solicitor, but the company might have a set-off against him.]

The company has had the benefit of Mr. *Peace's* services, and has acknowledged its liability to him, and actually made a payment on account. A similar difficulty from want of privity of contract was got over in *In re Tilleard* (1).

[The case then stood over that the liquidator who had been served, but did not appear, might attend.]

Nov. 21. *J. Beaumont* appeared for the liquidator, and stated that the company had claims against *Mycock* to an extent larger than the amount of the costs in question, but that they arose in respect of matters subsequent to the formation of the company.

(1) 3 D. J. & S. 519.

On behalf of the liquidator he submitted the point to the Court, stating that the liquidator did not wish to oppose the claim.

Marten, Q.C., and *Swinfen Eady*, for the Appellant:—

In re Tilleard (1) supports our case.

[COTTON, L.J.:—That turned on an Act of Parliament, which can do things that could not be done by an agreement.]

The company is liable under the articles to pay, apart from any agreement with *Mycock*.

[COTTON, L.J.:—That would not enable *Peace* to sue them. An Act of Parliament can enable *A.* to sue *B.*, though there is no contract between them, but an agreement between *B.* and *C.* cannot].

If the company had put *Peace* at arm's length he would have been in a different position—he probably had a lien which he could have asserted, and he may have had a better remedy against *Mycock* than he has now, he has altered his position in consequence of the course taken by the company. The company recognised his claim by a payment on account, and the arrangement at the meeting is a novation. Apart from that, the company having had the benefit of Mr. *Peace's* services is bound to pay. *In re Hereford and South Wales Waggon and Engineering Company* (2) is in our favour on that point, and the title of the solicitor in such a case to prove on a *quantum meruit* is recognised in *In re Empress Engineering Company* (3).

[LINDLEY, L.J.:—The Court does not seem to me to have given any opinion on that point.]

James, L.J., there explains the *Hereford and South Wales Case* in a way which makes it a complete authority in our favour.

COTTON, L.J.:—

This is an appeal by Mr. *Peace* from the refusal of Vice-Chancellor *Bacon* to vary the Taxing Master's certificate. The facts

(1) 3 D. J. & S. 519. (2) 2 Ch. D. 621.
(3) 16 Ch. D. 125.

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are shortly these. Mr. *Peace* was the solicitor employed by *Mycock*, the promoter of the company, to do what was necessary for the formation of the company, and was afterwards employed by the company about the conveyance to the company of the property purchased by it from *Mycock*. The company was formed, and was afterwards ordered to be wound up. Mr. *Peace* carried in a claim for a bill of costs, part of which is for work done on the retainer of *Mycock* before the formation of the company? The Taxing Master has disallowed this part of his bill, and the Vice-Chancellor has affirmed his decision.

On what ground can these costs be claimed against the company? The Appellant relies on the agreement between the company and *Mycock*, that the company should pay all the costs incidental to the formation of the company, and on subsequent transactions to which I shall presently refer.

Now first as to the contract between *Mycock* and the company, that the company should pay *Mycock* the costs incurred by him about forming the company. That contract could not give Mr. *Peace* any direct claim against the company. We thought, however, that Mr. *Peace* might be held entitled to stand in the place of *Mycock* against the company, and the case stood over that it might be ascertained whether the company had any claims against *Mycock*. It now appears that the company have claims against *Mycock* which would neutralise any claims by him against them, so Mr. *Peace* cannot have any relief on that footing.

Then it is said that the company has had the benefit of Mr. *Peace's* services, and ought to pay for them. That argument cannot in my opinion prevail. The business was done on the retainer of *Mycock*, and the company are purchasers from him. They get the benefit of Mr. *Peace's* services in no other way than a purchaser gets the benefit of work done by the vendor on the property. In such a case, even if there is a contract by the purchaser with the vendor to pay all the expenses of the work, that will not give the workmen a claim against him. The case of *In re Hereford and South Wales Waggon and Engineering Company* (1) was relied on, where it was said that but for the equitable ground of defence there set up *Walter* and *Head* would have had a good

(1) 2 Ch. D. 621.

claim, but in that case the services were not done on the retainer of any other person who was liable to pay for them. In the same case *Bramwell*, who had been employed by *Walter* and *Head*, and urged that the company had taken the benefit of his services, was held to have no claim against the company. The present case, therefore, is disposed of by authority.

Then it is said that a contract was subsequently entered into that the company should pay Mr. *Peace* instead of *Mycock* paying him and being reimbursed by the company. If that could be made out Mr. *Peace* could sustain his claim against the company. But is such a contract proved? The agreement by *Mycock* with the company, and the direction in the articles that the company should pay the costs, would not give Mr. *Peace* a claim against the company. It is said that what took place at the meeting of subscribers on the 27th of February, 1881, amounted to a novation. [His Lordship read the passage given above from Mr. *Peace's* affidavit.] The effect of that is doubtful. If an agreement was come to, *Mycock* being present, that the company should pay the costs not to *Mycock*, but to *Peace*, he releasing *Mycock* from his claim, that would be a novation. But we must consider whether there was any agreement between *Peace* and the company that *Peace* and not *Mycock* should be paid by the company. We have looked at the minutes, there are many resolutions, but none of them relate to these costs. If it had been intended that an agreement should be made altering the mutual rights of *Peace*, *Mycock*, and the company, we should expect it to be evidenced by some minute. Assuming, therefore, as I in fact do not doubt, that Mr. *Peace* has stated to the best of his recollection what passed at that meeting, I think it not established that a new agreement was made. I think that what passed cannot be taken as anything more than a statement of the probable result of the arrangements between *Mycock* and the company, viz., that Mr. *Peace* would be paid by the company.

Then the circumstance is relied on that Mr. *Peace* made a subsequent application to the directors for part of these costs, and that a cheque was given to him for £39. If there had been any resolutions of the board admitting his claim against the company that would materially alter the case, and probably would entitle Mr. *Peace* to succeed. But we have nothing more than a resolu-

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tion that the cheque should be given, and this resolution was passed on the proposal of *Mycock*, who had a right to call on the company to pay the costs. This payment may therefore be considered as made in part satisfaction of the claim of *Mycock*, and does not amount to a recognition of the claim of *Peace* against the company.

LINDLEY, L.J.:—

I am of the same opinion. I will first consider the question whether any verbal agreement between the company and Mr. *Peace* that the company should pay him, is made out. The case is in a peculiar position, for no one appears to oppose the claim of Mr. *Peace*, or to sift the evidence adduced by him. On perusing Mr. *Peace's* affidavit I was inclined to think that he had made out his case; but on examining the minute-book I find no corroboration of his evidence, there being no mention of his claim in the minutes of the 27th of February, 1881, and the resolutions of the 21st of December in that year being consistent with either view of the case. I do not throw any discredit on Mr. *Peace*, who, no doubt, has given, to the best of his belief, a truthful account of what took place at the meeting in February; but my impression is that there was nothing more than a loose conversation which could not constitute an agreement binding on the company. The burden of proof lies on Mr. *Peace* to shew an agreement, and I have arrived at the conclusion that though there is evidence to go to a jury of the existence of an agreement, the evidence is insufficient to establish it.

Then, can Mr. *Peace*, apart from any such agreement, establish his claim? In my opinion he cannot. The articles of association bind the company to pay these costs; but Mr. *Peace* was no party to the articles, which only constituted an agreement between the company and *Mycock*. If he had brought this action against the company with no materials except proof that he had done the business, and the provisions in the articles, he could not have succeeded. This is shewn by many cases, amongst which I may refer to *Eley* v. *Positive Government Security Life Assurance Company* (1), where it was held that articles of association do not constitute a contract between the company and

(1) 1 Ex. D. 20, 88.

an outsider. A provision in an Act of Parliament may enable an outsider to sue. There is in such cases a statutory obligation of which the person named can take the benefit—an action for debt on a statute being a well known old form of action at Common Law; but an agreement between *A.* and *B.* that *B.* shall pay *C.*, gives *C.* no right of action against *B.* I cannot see that there is in such a case any difference between Equity and Common Law, it is a mere question of contract. It is said that Mr. *Peace* has an equity against the company because the company has had the benefit of his labour. What does that mean? If I order a coat and receive it, I get the benefit of the labour of the cloth manufacturer; but does any one dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done for somebody else he is liable to pay the person who did the work.

FRY, L.J.:—

I am of the same opinion. The Appellant rests his case on two grounds. One is that where a person takes property on which labour has been expended and gets the benefit of that labour he must pay for it. As pointed out by Lord Justice *Lindley*, that is by no means universally true. It is not true where the work was done for the vendor of the property, and that was the case here, these costs having been incurred on the retainer of *Mycock*.

The second ground is that a novation was effected by what took place at the meeting of the 27th of February, 1881. Mr. *Peace's* affidavit gave some colour to the contention that a new contract was then made by which the company agreed to pay Mr. *Peace*, he releasing *Mycock*. I do not, however, think that such an agreement is proved, for the minutes of that meeting, though they contain a record of many resolutions passed at it, are silent as to this alleged new contract. I am therefore of opinion that the appeal fails.

Solicitors: *Peace & Co.*

H. C. J.

C. A.
1883
Nov. 16, 21.

Ex parte JOHNSON. *In re* JOHNSON.

Debtor's Summons—Service—Inaccurate Copy of Summons—Service by Clerk of Creditor—"Formal defect or irregularity"—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 82—*Bankruptcy Rules*, 1870, *rr.* 59, 61.

On serving a debtor with a debtor's summons the sealed copy which was delivered to him stated the amount of the debt claimed by the creditor to be £24 (instead of £74, the real amount), but these words were added, "being the sum claimed of you by him according to the particulars hereunto annexed." The particulars thus referred to were set forth on the second half of a sheet of paper, the first half of which contained the summons. The particulars stated the amount of the debt, and the circumstances under which it arose, correctly:—

Held, that the error in the summons was a merely "formal defect" within the meaning of sect. 82, by which the debtor could not possibly have been misled, and that no substantial injustice had been caused to him by it, and, consequently, that the service of the summons was not invalidated by it, and an adjudication of bankruptcy founded on the summons could not be impeached.

The summoning creditor was a solicitor, and the service of the summons was effected by his clerk, instead of by himself or his attorney, or by an officer of the Court, as required by rule 61:—

Held, that this irregularity also was cured by sect. 82.

THIS was an appeal by *George Johnson*, a solicitor, against an order adjudicating him a bankrupt, which was made on the 8th of September, 1883, by Mr. Registrar *Hazlitt*.

The petition for adjudication was presented by *Robert Greening*, another solicitor, the act of bankruptcy alleged being the non-compliance by *Johnson* with a debtor's summons for a sum of £74 6*s.* 8*d.* *Johnson* opposed the making of an adjudication, on the ground that he had never been duly served with a debtor's summons for the sum claimed. The alleged service was effected by delivering to *Johnson* a document which purported to be a sealed copy of the original summons. In this copy the debt claimed was stated to be £24 6*s.* 8*d.*, "being the sum claimed of you by him, according to the particulars hereunto annexed, for the aggregate amount of taxed costs which, by the judgment of the Queen's Bench Division of the High Court of Justice, dated the 13th of June, 1883, and by an order of the said Court, dated the 6th of July, 1883, given and made in a certain action wherein

you, the said *George Johnson*, were Plaintiff, and the said *Robert Greening* was Defendant, was adjudged to be paid by you to him." The particulars there referred to (which were a copy of particulars of demand which had been previously served on *Johnson*), were set forth on the second half of a sheet of paper, the first half of which contained the copy of the debtor's summons, and in these particulars the debt claimed was stated to be £74 6*s.* 8*d.*, as it was stated in the original summons. The service on *Johnson* was effected by a clerk in the employment of *Greening*. The Registrar overruled the objections, and made the adjudication. *Johnson* appealed. In support of his appeal he made an affidavit, to which he made the copy of the debtor's summons which was served on him an exhibit, but before doing so he tore off from it the half sheet which contained the particulars of demand. And he deposed that the only document in the nature of a summons, or copy thereof, served upon him was the paper writing which he made an exhibit.

Wyatt Hart, and *Dale Hart*, for the Appellant:—

The misstatement of the amount of the debt contained in the copy of the summons which was served on the debtor is fatal to the validity of the service. The document which was served was not "a copy" of the summons within the meaning of rule 59 of the Bankruptcy Rules, 1870 (1). Proceedings taken with the view of obtaining an adjudication of bankruptcy are of a penal nature, and the utmost strictness will be required: *Ex parte Tindall* (2). And, on the hearing of a bankruptcy petition founded on the debtor's non-compliance with a debtor's summons, the service of the summons must be strictly proved, even though the debtor has, on a previous application by him to dismiss the summons, admitted service: *Ex parte Rogers* (3).

(1) Rule 59: "A debtor's summons shall be personally served within twenty-one days from the date of the summons, by delivering to the debtor a sealed copy of the summons."

Rule 61 provides that "a debtor's summons or a petition shall be served upon the debtor by an officer or a bailiff of the Court, or by the creditor or his attorney," but gives power to the Court to make an order for substituted service if it is satisfied that the debtor is keeping out of the way to avoid personal service.

(2) 6 D. M. & G. 741.

(3) 15 Ch. D. 207.

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Ex parte JOHNSON.

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The service is also irregular, because rule 61 has not been complied with. If the creditor has not a solicitor on the record he is bound to serve the summons himself. *Ex parte Lancaster* (1) does not apply. A solicitor is a responsible officer of the Court, and that is the reason why he is allowed to serve the summons instead of the creditor himself.

F. Cooper Willis, for the petitioning creditor, was called upon only as to the error in the statement of the amount of the debt:—

The reference in the copy served to the particulars annexed, in which the amount of the debt was correctly stated, gave the debtor full information, and it is impossible that he could have been misled. The circumstance that he tore off from the copy of the summons the half sheet containing the particulars before exhibiting it to his affidavit is very suspicious. It shews an intention to mislead the Court. This error is merely a formal defect or irregularity, and does not invalidate the proceedings, for no substantial injustice has been caused by it: *Bankruptcy Act*, 1869, s. 82 (2). *Ex parte Tindall* (3) was decided before the Act of 1869, at a time when much more strictness in procedure was required.

Wyatt Hart, in reply:—

The *ratio decidendi* of *Ex parte Tindall* was that in a *quasi* criminal or penal matter the utmost strictness in procedure must be observed. The same principle is illustrated by *In re Holt* (4).

[COTTON, L.J.:—That was a case of attachment.

LINDLEY, L.J.:—Sect. 82 is the difficulty in your way.]

Sect. 82 applies only to a "proceeding in bankruptcy," *i.e.*, to a proceeding after an adjudication has been made. It does not

(1) 3 Ch. D. 498.

(2) Sect. 82: "No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to such proceeding is of opinion that substantial injustice has been caused by such defect or irregularity, and that such injustice cannot be remedied by any order of such Court."

(3) 6 D. M. & G. 741.

(4) 11 Ch. D. 168.

apply to a proceeding, such as the issuing or serving of a debtor's summons, which is taken for the purpose of obtaining an adjudication. Why should the person served be bound to look beyond the summons itself? Why should he not be entitled at once to disregard it if he sees that the sum claimed is less than the amount the non-payment of which will constitute an act of bankruptcy? Rule 19 of 1870 provides that "the particulars of demand shall be expressed, with reasonable and convenient certainty as to dates and all other matters, but no objection shall be allowed to the particulars unless the Court shall consider that the debtor has been misled by them." There is no such provision as to the debtor's summons itself. In *Ex parte Coates* (1) it was held that a bankruptcy petition which alleged as an act of bankruptcy that a trader had departed from his dwelling-house or otherwise absented himself, without adding that he had done so with intent to defeat or delay his creditors, was demurrable and must be dismissed, the defect being, not merely formal, but matter of substance, and not capable of being cured by amendment.

COTTON, L.J. (after stating the facts and the nature of the objections), continued:—

The reference in the debtor's summons to the particulars of demand (which stated the amount of the debt correctly), and to the judgment in the Queen's Bench Division, shews that the debtor could not have been misled by the misstatement of the amount of the debt in the summons itself. In my opinion he could not have been, and was not misled. Still, no doubt, a person who is taking the benefit of this proceeding by debtor's summons must comply strictly with the provisions of the Act and the Rules. But then there is sect. 82, and the question to be considered is whether a debtor's summons is a "proceeding in bankruptcy." In my opinion a debtor's summons, being issued for the purpose of founding upon it an adjudication of bankruptcy against the debtor, is a "proceeding in bankruptcy." And, in

(1) 5 Ch. D. 979.

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my opinion, the error in the statement of the debt in the present case was simply a "formal defect," and I am satisfied that no injustice whatever has been caused to the Appellant by it. He had the means of correcting the error, and no injustice has been done to him. However the case might have stood in the absence of sect. 82, I think that section requires us to hold that there has been nothing more than a formal defect, and that the proceedings are not invalidated by it. Several cases have been referred to. One is *Ex parte Coates* (1). There the petition for adjudication did not allege any act of bankruptcy, for the departure of a trader without any intent to defeat or delay his creditors would not be an act of bankruptcy. That was a matter of substance, not a merely formal defect. The petition ought to shew what charge the debtor has to come and meet. Another case was *Ex parte Rogers* (2). On the hearing of a petition for adjudication it is necessary for the petitioner to prove the act of bankruptcy on which he relies, and in that case the petitioner did not prove the service of the debtor's summons which was the foundation of his petition, and, therefore, it was held that the adjudication could not be maintained. In *Ex parte Tindall* (3), the copy of the summons which was left with the debtor did not bear the signature of the Commissioner, and the Court held that the signature was an essential part of a true copy, and that therefore the service was bad. *In re Holt* (4) was a case of attachment for disobedience to an order of the Court, and in the copy of the order which had been served on the person whom it was sought to commit a most essential part of the order had been omitted. In my opinion, the defect in the copy of the summons which was served in the present case is entirely cured by sect. 82, and the objections to the service ought not to prevail. I am also of opinion that the irregularity in the service of the debtor's summons by the creditor's clerk is also cured by sect. 82. The appeal must, therefore, fail. I cannot, however, refrain from expressing my strong disapprobation of the course taken by the Appellant in tearing off that half of the document served on him which was most material, and

(1) 5 Ch. D. 979.
(2) 15 Ch. D. 207.
(3) 6 D. M. & G. 741.
(4) 11 Ch. D. 168.

only making an exhibit of the other half. Such conduct on the part of a solicitor is most reprehensible.

LINDLEY, L.J.:—

I am of the same opinion, and I entirely concur in the last observations of the Lord Justice. It appears to me that there is nothing in any of the irregularities which have been pointed out. I was, indeed, at first struck with the misstatement of the amount of the debt; it struck me as a serious objection to the service. Was the debtor when he saw that he was summoned for a debt of £24 bound to read on any further, or might he not say, I am summoned for a debt in respect of which I cannot be adjudicated a bankrupt, and therefore I need not pay any attention to the summons? When, however, we look at sect. 82 it becomes quite a different matter. It is said that the issuing and serving of a debtor's summons is not a "proceeding in bankruptcy." What is a "proceeding in bankruptcy?" If we look at sub-sect. 6 of sect. 6, at the form of debtor's summons given in the schedule to the Rules of 1870, and at the provisions of the Rules themselves, we see that a debtor's summons and the proceedings upon it are throughout treated as "proceedings in bankruptcy." What is the issuing and service of a debtor's summons, but a "proceeding in bankruptcy"? If so, the present case is clearly within the words of sect. 82. Then we have to consider whether the defect or irregularity was of such a nature that any injustice has been caused by it to this debtor, and as to that there cannot be two opinions. When a man is told that the debt mentioned in the summons is claimed "according to the particulars hereunto annexed," and the amount of the debt is correctly stated in the annexed particulars, it is perfectly clear that he cannot be misled by the error in the summons. I think the defect is amply covered by sect. 82.

FRY, L.J.:—

I am entirely of the same opinion. I think that sect. 82 has entirely cured both the defects, the mistake in the copy of the summons, and the irregularity in the mode of service.

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Nov. 21. The debtor in person asked for leave to appeal to the House of Lords.

The COURT (*Cotton*, *Lindley*, and *Fry*, L.JJ.), refused the application.

Solicitor for Debtor: *John Grove.*
Solicitor for Petitioning Creditor: *Robert Greening.*

W. L. C.

C. A. 1883 Nov. 26, 27.

In re TAURINE COMPANY.

Winding-up—Transfer of Shares pending Proceedings for Voluntary Liquidation—Voluntary Winding-up followed by Compulsory Winding-up—Commencement of Winding-up—Committee of Directors.

The articles of a company enabled the board of directors to appoint committees of their own number, and to delegate to any such committee all or any of the powers of the board. Transfers of shares were to be effected only by instruments executed both by the transferor and transferee, and were not to be made without the approval of the board, which had an absolute discretion as to accepting a transfer. On the 2nd of November, 1874, the board appointed *H. B.* a committee with all the powers of the board. On the 24th of December, 1874, a board meeting was held, at which only *H. B.* and the secretary were present. At this meeting transfers, which had on the previous day been executed by *X.* and *Y.* to various persons of 1519 shares standing in the joint names of *X.* and *Y.*, were approved, and the transferees placed on the register. *H. B.* deposed that all formalities had been waived, and there was no evidence whether the transfers had been executed by the transferees. On the same day a general meeting of shareholders was held, at which resolutions were passed for a voluntary winding-up of the company, and the transfer of its business to a new company, each shareholder in the old company taking the same number of shares in the new, and this was confirmed by a meeting of the 15th of January, 1875. At neither of these meetings did the transferors vote in respect of the shares transferred, but several of the transferees did, and the transferees were registered as shareholders in the new company. It did not appear that the old company was insolvent, but it was considered desirable to reconstitute it. In March, 1877, a petition was presented by some of the transferees for the compulsory winding-up of the old company, upon which an order was made on the 17th of the same month. The transferees were placed on the list of contributories. In 1881 some creditors, pursuant to leave given, applied in the name of the official liquidator to put *X.* and *Y.* on a supplemental list of contributories of the old company for the

1519 shares, and if not then on a B list as past members. The application was refused by *Bacon*, V.C.:—

Held, that the fact that the transferors knew that the company was on the eve of being wound up voluntarily did not take away their power of transferring their shares, and that the transfers of the 1519 shares were not invalid on that ground.

Chappell's Case (1) distinguished.

Held, also, that a committee of the board of directors need not consist of more than one person, and that *H. B.* had authority to approve the transfers:

Held, also, that it was not to be inferred in the absence of express evidence that the transfers had not been executed by the transferees.

Held, that, if they had not been so executed they were not a nullity but only irregular, and that after they had been acted upon and treated as valid for so long a period they could not be impeached:

Held, therefore, that *X.* and *Y.* could not be placed on the list of contributories as present members:

Held, by *Lindley* and *Fry*, L.JJ., that *X.* and *Y.* could not be placed on the B list as past members, for that the winding-up was to be treated as having commenced at the presentation of the petition, which was more than twelve months after they transferred their shares; *dissentiente*, *Cotton*, L.J., who was of opinion that it commenced from the date of the resolution for voluntary winding-up, at which time *X.* and *Y.* had not ceased for twelve months to be shareholders.

THE *Taurine Company, Limited*, was registered in February, 1873, with a nominal capital of £200,000, divided into £10 shares. £5 per share was paid up.

The articles of association contained *inter alia* the following provisions:—

"21. The board shall consist of such number of directors as a general meeting shall from time to time determine, and unless and until and subject to such determination shall consist of any number not exceeding five directors."

"23. *E. Boucher*, Esq., *C. Shield*, Esq., and *A. Robinson*, Esq., shall be the first directors of the company. The board may at any time previous to the ordinary meeting to be held in the year 1875, elect additional directors, but so that the total number of the directors shall not at any time exceed five."

"31. Every director shall vacate his office on ceasing to be a shareholder, or to hold his qualifying number of shares, &c., &c.

"32. A director may at any time give notice in writing of his

(1) Law Rep. 6 Ch. 902.

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wish to resign, and on the acceptance of his resignation by the board, but not before, his office shall be vacant."

"36. The board may act notwithstanding any vacancy in their number."

"39. The board may appoint and remove such committees of their own number as they think fit, and may determine and regulate their quorum, powers, duties, and procedure.

"40. The board may appoint and remove such local committees in any county or place, and consisting of such persons whether shareholders or not, as the board may think fit, and may determine and regulate their quorum, duties, procedure, and remuneration.

"41. The board may appoint any director to be managing director of the company . . . . and the director so appointed shall not be thereby disqualified from acting as director.

"42. The board may appoint any person from time to time to be agent, general or local manager, or representative of the company, at such place, for such times, &c., as the board shall think fit.

"43. The board may from time to time delegate to any such local or other committee, managing director, manager, agent, or representative, all or any of the powers, authorities, and discretions of the board."

"48. The quorum of every board shall be such number as shall be appointed from time to time by the board, and in default of such appointment shall consist of two directors."

Art. 54 provided for minutes of the proceedings at every meeting of the board, and directed them to be signed by the chairman of the meeting to which they related, or at which they were read.

"55. Every committee shall keep minutes of its proceedings and shall cause them to be signed, as directed by art. 54 for the board minutes.

"56. Every board or committee minute, recorded and signed as hereinbefore directed, shall be evidence of the facts therein recorded, and of the regular holding of the board or committee meeting to which it relates."

"108. Transfers of registered shares shall be effected only by

an instrument in writing signed by the transferor and transferee, and lodged at the office for registration."

"111. A transfer of a registered share shall not be made by any person until after he has given to the secretary or left at the office notice in writing of the number of every share desired to be transferred, and of the name, residence, and description of the proposed transferee, and answered such questions concerning the position of such transferee as the board may put, and has paid the transfer fee of 2*s.* 6*d.*, or such other sum as the board prescribe.

"112. A transfer of a registered share, except a fully paid-up share, shall not be made without the approval of the board, who shall have an absolute discretion as to accepting or rejecting the transfer, and shall not be bound to give any reason for their rejecting it."

At the time when the board meeting of the 2nd of November, 1874, which is about to be mentioned, was held, the directors were, the three named in the articles, viz., *Boucher*, *Shield*, and *Robinson*, and also *Hemmerde* and *Lander*.

At a meeting of directors held on the 2nd of November, 1874, at which *Hemmerde* and *Robinson* only were present, the resignation of *Shield* was read and adopted, and *Henry Beckwith* was appointed a director in his place, and took his seat. Several transfers were then ordered to be registered, one of which was by *Hemmerde*, who thereby became disqualified, and vacated his seat. and the chair was taken by *H. Beckwith*. *Lander* had also become disqualified by reason of one of the transfers. It was then resolved, "That Mr. *H. Beckwith* be, and he is hereby appointed a committee with all the powers of the board." *Robinson* then tendered his resignation, which was accepted.

At a subsequent "board meeting" on the same day, at which *H. Beckwith* only was present, *Robinson*, having expressed a wish to withdraw his resignation, was re-elected a director.

Previous to the meeting of the 24th of December, 1874, which will shortly be mentioned, *John Beckwith*, *Robinson*, and *Martin* had become joint holders of 1519 shares.

On the 24th of December, 1874, a board meeting was held at which only *H. Beckwith* and the secretary were present. No

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entry of its proceedings appeared in the directors' minute-book, but an agenda-book in *H. Beckwith's* handwriting was produced, from which it appeared that transfers of the 1519 shares, and of other shares to various persons, which had been executed on the 23rd were to be submitted for approval, *H. Beckwith* being the transferee of 751 out of the 1519. He deposed that the transfers by *J. Beckwith*, *Robinson*, and *Martin*, of the 1519 shares were duly executed by them, and that "every formality or condition with reference to the transfer of shares, which might have been insisted on by the company under the articles of association was waived and dispensed with by the company, and all the transfers presented at such meeting, including those above-mentioned, as executed by the said *J. Beckwith*, *A. Robinson*, and *P. Martin* were duly approved and ordered to be registered." He further stated that the names of the transferees were entered on the register of members, and the names of the former holders crossed out in red ink. The names of the transferees were also entered in the share ledger. The entries were in *H. Beckwith's* handwriting.

The transfers were subsequently lost, *H. Beckwith*, the voluntary liquidator, stating that he did not know what had become of them, and *Williams*, the subsequent official liquidator, stating that he had not found them among the papers handed to him, and there was no statement in any of the affidavits that they had been executed by the transferees, but there was no evidence to raise the inference that they had not, unless it was to be inferred from the above statement as to waiver of formalities, from the absence of any trace of payment of transfer fees, or of any issue of certificates.

After these proceedings, and on the same day, an extraordinary general meeting of shareholders was held, at which the following resolutions were passed: (1.) That the company should be wound up voluntarily; (2.) That *H. Beckwith* should be appointed liquidator; (3.) That *H. Beckwith* as such liquidator should be authorized to do and concur in the following acts, viz., to concur in the formation and registration of a new company, to be called the *Taurine Company, Limited*, with a capital of £50,000, in £5 shares; to sell to such intended company the interest of the old

company in their business premises, and the stock-in-trade, goodwill, book-debts, cash, and other effects of the old company, or such of them as might be agreed upon between him and a trustee on behalf of the intended company; to accept as the consideration payable therefor such an amount in fully paid-up shares of the intended company as would equal in nominal value the amount paid up on the shares in the existing company, which were thereupon to be delivered up to the liquidator to be cancelled.

Neither *John Beckwith*, *Robinson*, nor *Martin* was present at this meeting, but two of their transferees, who were not shareholders before the transfer, attended and voted, and *H. Beckwith* was present and voted in respect of the shares transferred to him as mentioned above.

On the 15th of January, 1875, an extraordinary general meeting was held, at which the above resolutions were confirmed. *H. Beckwith*, and four other of the transferees from *J. Beckwith*, *Robinson* and *Martin*, attended and voted in respect of the shares so transferred. The resolutions were duly registered in the office of the Registrar of Joint Stock Companies.

On the 17th of April, 1875, the new company was incorporated. The new company took the assets of the old company, and the persons who were the shareholders in the old company after the transfer, including the transferees from *J. Beckwith*, *Robinson* and *Martin*, took the shares in it, each having the same number of shares in the new company as he had in the old. It appeared that the old company on the 24th of December, 1874, was not in a flourishing condition, but *H. Beckwith* deposed that it was solvent and that all its debts had been paid by him as liquidator, or by the new company out of the assets of the old company which were transferred to it. The debt of the creditors who took the present proceedings, and who were landlords of the company, was never paid.

On the 8th of January, 1876, an order was made for the compulsory winding-up of the new company. On the 7th March, 1877, a petition was presented by two of the transferees from *J. Beckwith*, *Robinson* and *Martin* for the compulsory winding-up of the old company, and an order for such winding-up was made on the

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17th. *W. Williams* was official liquidator under both orders. *John Beckwith* and *Martin* were placed on the list of contributories of the old company in respect of shares held by them on the 24th of December, 1874, but not in respect of any of the 1519 shares, the transferees being placed on the list in respect of those shares.

On the 17th of December, 1880, an application was made by creditors whose claims had been allowed against the old company, that *Williams* might be removed and another liquidator appointed. The application was not granted, but it was ordered that the applicants should be at liberty to take proceedings to settle a supplemental A list and a B list of contributories of the old company, and to use the name of the official liquidator for that purpose, they indemnifying him against the costs.

The applicants accordingly took out a summons in the name of the official liquidator to settle *John Beckwith* and *Robinson* (*Martin* being dead) on a supplemental A list of contributories for 1519 shares, or on a B list for those shares. Vice-Chancellor *Bacon* dismissed the summons and the applicants appealed. The appeal was heard on the 26th and 27th of November, 1883.

Hemming, Q.C., and *H. B. Buckley*, for the appeal :—

J. Beckwith and *Robinson* ought to be on the A list. There is no evidence that can be acted upon of the proceedings at the board meeting of the 24th of December, 1874. An agenda-book in *H. Beckwith's* own writing is not admissible evidence of resolutions which ought to have been entered in the books of the company. But suppose there was such a "meeting," it really was not a meeting at all, nobody being present but *H. Beckwith*, who assumed to act as committee. But a single person cannot form a committee. All the directions in the articles as to committees point to their consisting of a plurality of persons, and one person cannot form a meeting: *Sharp* v. *Dawes* (1). There was, therefore, no effectual assent by the board to the transfers. There is no evidence that the transfers were executed by the transferees, and from the silence of *H. Beckwith* and the other circumstances it must be assumed that they were

(1) 2 Q. B. D. 26.

not, and as the transfers under the articles could only be made by instruments executed by both parties, the transfers are void. Moreover the transfers were made after notice had been given of a meeting to pass a resolution for the winding-up of the company, and we say that on that ground they are invalid. In *Chappell's Case* (1), where the transactions were very similar to those in the present case, it was held that the shares could not be transferred. In *Allin's Case* (2) Lord *Selborne* agrees with the opinion expressed by Lord Justice *James* in *Chappell's Case*, and disagrees with Lord Justice *Mellish*. In *Tennent* v. *City of Glasgow Bank* (3) an action to rescind a contract to take shares was commenced after the stoppage of the bank and notice of a meeting to wind up, and it was held too late. That is not precisely in point, but it furnishes an analogy in our favour, and the observations of Lord *Cairns* support our case. A person cannot repudiate shares unless he commences proceedings before the commencement of the winding-up, but the case shews that the proceeding is not necessarily in time because it is commenced before that period. When it is evident that a company must be wound up a new state of things arises. The directors here having resolved that the company must be wound up, owed a duty to creditors, and ought to have disallowed all transfers which would lessen the stability of the company.

[FRY, L.J.:—Is there any evidence that the company was insolvent.]

It is only to be inferred from the fact that so many shareholders were anxious to get out. The whole transaction of December, 1874, was in fact a fraudulent attempt to reduce the capital of the company, without any of the safeguards required by the statutes as to reducing capital. *J. Beckwith* and *Robinson* ought then to be on the A list.

Then as to the B list, we say that even if the shares were effectually transferred, so that these parties cannot be put on the A list, they ought to be on the B list, for that the commencement of the winding-up is in this case the passing of the confirmatory

(1) Law Rep. 6 Ch. 202. (2) Law Rep. 16 Eq. 449.
(3) 4 App. Cas. 615.

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resolutions for voluntary winding-up, and not the presentation of the petition for compulsory winding-up. This is shewn by *Thomas* v. *Patent Lionite Co.* (1). It would lead to great anomalies if when a voluntary winding-up has been going on for some time, a subsequent compulsory winding-up were to release a number of parties who would have been liable under the original winding-up.

[LINDLEY, L.J.:—Ought the liquidator to be allowed now to alter a state of things in which he has acquiesced so long.]

The settlement of a list of contributories is not final if new facts are discovered: *Budd's Case* (2); and where an order for winding-up has been made, an error may be set right after a length of time: *Sand's Case* (3). Besides which it was because we, as unpaid creditors, complained of the conduct of the liquidator that we were allowed to use his name.

Marten, Q.C., and *A. àB. Terrell*, for *J. Beckwith* and *Robinson*:—

We say that *H. Beckwith*, as committee of the directors, had power to approve the transfer. It is said that there cannot be a committee of one person, but art. 68 of Table A to the *Companies Act*, 1862, clearly authorizes a committee of one, though the other clauses use language adapted to the common case of a committee consisting of several persons. In the 'Imperial Dictionary' "committee" is defined as "one or more persons elected or appointed to whom any matter or business is referred, &c." The interpretation clause in the articles provides that words importing the plural number only shall include the singular number. Clause 43 is general, its terms are wide enough to authorize the appointment of a committee of one, and it is not cut down by the reference to a plurality of persons in the other clauses. The Court will not be inclined to proceed on the view that the powers cannot be delegated to a committee of one when there are express clauses authorizing the delegation of all the powers of the board to a single agent.

(1) 17 Ch. D. 250. (2) 3 D. F. & J. 297.
(3) 32 L. T. (N.S.) 299.

[COTTON, L.J.:—Suppose the board appoints a committee, and is then reduced to less than a quorum, can the committee act?]

We submit that he can, so long as there is a board or a possibility of making up one, though not if the board had vanished under such circumstances that it could not be restored. If the directors were reduced to one, so that there could not be a meeting, still there would be a board, and the powers of the delegate would continue. Art. 36 provides for the board acting notwithstanding vacancies, and this modifies art. 48. It is urged that there is no evidence of a meeting at which the transfers were approved, but an agenda-book is a proper record. The lapse of time is a fatal objection to putting the shareholders on the A list. Mere irregularities in the transfers will not make them invalid after they have been acted upon: *Murray* v. *Bush* (1); and especially where there has been such delay, slight irregularities will not defeat the transfers: *In re Bonelli's Telegraph Company* (2); *Masters's Case* (3). The presumption is to be made that the acts of the committee were authorized: *Totterdell* v. *Fareham Blue Brick and Tile Company* (4). For five years the winding-up has been going on upon the assumption that the transfers were good. The Petitioners, who obtained the winding-up order, had no *locus standi* if they were void, and now it is sought to upset everything. As to the argument that after a notice to wind up had been given no shareholder could transfer, that might be the case if the company was notoriously insolvent; but there is nothing of the sort here, the winding-up being only for the purpose of reconstruction.

As regards the B list, the commencement of the winding-up must mean the commencement of that winding-up under which the Court is acting.

[COTTON, L.J.:—Has not winding up been going on ever since the resolution to wind up?]

No. That winding-up is done with.

[FRY, L.J.:—The Act seems to contemplate one winding-up. Are not you making two?]

(1) Law Rep. 6 H. L. 37.
(2) Ibid. 12 Eq. 246.
(3) Law Rep. 7 Ch. 292.
(4) Ibid. 1 C. P. 674.

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This is a winding-up by the Court, not a winding-up under the resolution. The voluntary winding-up came to an end, and is superseded by the compulsory winding-up. *In re United Service Company* (1) proceeds on the footing that a compulsory order for winding up would alter the date of commencement.

[FRY, L.J.:—Does it not proceed on the footing that a compulsory order may be made to relate back to an earlier date than the presentation of the petition?]

Sect. 151 shews that a supervision order does not affect the prior proceedings in the voluntary winding-up.

[FRY, L.J.:—Your difficulty is that sect. 152 makes a compulsory winding-up supersede a winding-up under supervision. Yet the Master of the Rolls makes the winding-up relate back, which can only be by treating the voluntary winding-up as not superseded for all purposes.]

Thomas v. *Patent Lionite Company* (2) is against relation back to the voluntary winding-up.

Hemming, in reply:—

There is no laches to be imputed to the liquidator, for everything on the face of the books appeared regular, and it was only by careful investigation that the irregularities could be found out, and we are in reality not the liquidator, but persons who complain of his laches, if there were any. The remarks of Lord *Cairns* in *Murray* v. *Bush* (3), which are relied on, must be qualified by what is said at p. 67, where he lays down the three requisites to a transfer. In that case, moreover, there was merely a positive direction, and the absence of negative words was the main ground of the decision. Here there is the negative word "only" making a transfer invalid if not executed by transferor and transferee and approved by the board. In *In re Bonelli's Telegraph Company* (4) there was only a trifling irregularity. In *Totterdell* v. *Fareham Blue Brick and Tile Company* (5) there was full *bona fides*. Here the reasonable inference is that the

(1) Law Rep. 7 Eq. 76.
(2) 17 Ch. D. 250.
(3) Law Rep. 6 H. L. 37.
(4) Ibid. 12 Eq. 246.
(5) Law Rep. 1 C. P. 674.

whole transaction was a scheme to get certain shareholders off the register.

As to the B list, if a person has become liable to contribute as a past shareholder under a voluntary winding-up, he cannot be released by a subsequent order for compulsory winding up.

[LINDLEY, L.J.:—Suppose a B list settled in the voluntary winding-up, the Court in a compulsory winding-up could, under sect. 146, adopt it, but can the Court adopt the resolution for winding up as part of the proceedings?]

I should say it certainly could if it thought fit.

The report of *In re United Service Company* (1) is very brief, and the point was not argued; the Court only resolved *valeat quantum* to do what it could to save the benefit of the earlier proceedings. In *Thomas* v. *Patent Lionite Company* (2) the principle is laid down that the voluntary winding-up is only superseded as regards future proceedings.

[FRY, L.J., referred to *In re Smith, Knight, & Co.* (3).]

That is an express decision as to the commencement of a winding-up under supervision, but there is no authority as to the effect of a compulsory order on the commencement of a voluntary winding-up except so far as the *Lionite Case* throws light on it.

COTTON, L.J.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*, refusing to put on the list of contributories two gentlemen who are already there for fifty shares, but whom the liquidator seeks to put on for a much larger number of shares which, it is alleged, ought to be treated as still standing in their joint names.

With reference to one branch of the case, it is important to come to a conclusion as to who is to be considered the Appellant. In my opinion it is the liquidator and nobody else. It is true that the Court, on an application by a creditor to remove the liquidator, which application the Court did not think fit to grant, gave the creditor who desired to take these proceedings liberty to use the name of the liquidator, indemnifying him against

(1) Law Rep. 7 Eq. 76. (2) 17 Ch. D. 250.
(3) Law Rep. 4 Ch. 20.

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costs, but still it is the liquidator only who, in my opinion, can be considered the Appellant.

The decision of the Court below was complained of on two points. The liquidator sought to put these gentlemen on the A list, and if that failed, then on the B list. The two cases are of course different, and I will first deal with the argument founded on *Chappell's Case* (1) urged on us by Mr. *Buckley*, because it depends not on the facts of the case, but on a point of law. These transfers were executed on the 23rd of December, 1874, by the transferors, and registered on the 24th, being the very day on which a resolution was passed for winding up the company voluntarily. It had been known long before the 23rd that such a meeting would be called, and it was apparent that the course proposed by the resolution was the only course that could be taken, not because the company was in such a state of indebtedness that it could not go on, but because for various reasons it was desired to form a new company out of the old company. The argument urged by Mr. *Buckley* was this, that when it was apparent the company would be wound up for whatever reason, then the power of transfer given by the articles was at an end and could not be exercised. If that is so, there was no power of transfer, because the transfer of shares depends on a right given by the articles, and does not exist independently of the right given by the articles according to the provisions of the statute. He referred to two cases in one winding-up, and to what was said in the House of Lords in *Tennent* v. *City of Glasgow Bank* (2). In my opinion it cannot be held that the power of transfer given by the articles, and allowed by the Act of Parliament, was at an end when notice was given that there would be a meeting to wind up this company. The time which the *Companies Act* fixes as the time after which no transfers can be made is the commencement of the winding-up, and in the case of a voluntary winding-up, even after that time transfers may be made if they are allowed by the liquidator, which is not quite consistent with the view urged on us by Mr. *Buckley*. He contended that the powers were given with reference to the company as a going concern, and not with reference to the company when known to be coming to its end, and to be on the eve of being

(1) Law Rep. 6 Ch. 902. (2) 4 App. Cas. 615.

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wound up. We need not go through the books to shew how constantly honest transfers registered before the commencement of the winding-up have been treated as effectual, although made when it must have been known that the company could not go on. In *Chappell's Case* (1) and *Allin's Case* (2) the company was entirely at an end by transfer of its business and property to another company. There it was held that there was no company; that the company, as far as the existence of shares was concerned, might be considered at an end, and that after the company had ceased to have property or shares it could not be said to be a company in which the shareholders could transfer, so as to enable themselves to say they were no longer shareholders.

The case of *Tennent* v. *City of Glasgow Bank* (3) was of a different description. The question there was whether one who was on the register was not too late in commencing proceedings to get relieved from his shares on the ground of misrepresentation. Lord *Cairns* did not decide the point, but intimated an opinion that when a bank had become insolvent and stopped payment it was too late for a shareholder to exercise his option and to avoid the contract to take shares. That does not bear on the present case, where the question is not whether the shareholder being induced by fraud to take the shares was in a position to exercise his option of repudiating them, but whether the power of transfer given by the articles and sanctioned by the Act of Parliament was at an end. In my opinion the argument that it was at an end cannot prevail.

Another point taken is that the transfer of these shares was not made in the way sanctioned by the articles, that, therefore, having regard to the enactment, which says the shares shall be transferred only in the manner authorized by the articles, there was no transfer, and that these gentlemen in respect of the 1519 shares must still be considered as properly on the register, and that the register ought to be rectified.

That is a point to be fully considered. At the board meeting on the 2nd of November, 1874, one of the members of the board retired, Mr. *H. Beckwith* was elected in his place, and then a

(1) Law Rep. 6 Ch. 902. (2) Law Rep. 16 Eq. 449.
(3) 4 App. Cas. 615.

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resolution was passed appointing Mr. *Henry Beckwith* a committee with all the powers of the board. Immediately after that Mr. *Robinson*, who had been at the time when the resolution was passed a member of the board, retired, and afterwards on the same day withdrew his resignation and came again on the board. For a long time it was considered in the course of the argument that on the question whether Mr. *Robinson* had effectually retired or not at the first meeting of the 2nd of November depended the question whether at the two meetings and afterwards there was any board at all, and whether the board was not reduced to one. But it turned out that there was a Mr. *Boucher*, who had originally been one of the directors, and had not resigned, but still held his qualification, and, although he had not acted for some time, was still a director. Therefore, assuming Mr. *Robinson* to have retired, there were still directors sufficient to constitute a quorum.

Then comes the meeting of the 24th of December. At this meeting there was great irregularity, because we do not find any minutes of its proceedings, and if it was a directors' meeting there was not a quorum present. Then comes the question whether the board had not delegated to Mr. *Henry Beckwith* as a committee the power of the directors to approve transfers. There is nothing, in my opinion, in the articles to prevent the appointment of a committee of one. It is very unusual, but still it may be done. As was pointed out, Table A. recognises the fact that one person may be appointed a committee. A committee means a person or persons to whom powers are committed which would otherwise be exercised by another body. I think, therefore, that Mr. *Henry Beckwith* had power to approve transfers.

It was very strongly urged that the articles required the transfers to be executed not only by the transferors but by the transferees, and that on the evidence we ought to come to the conclusion that these transfers were not executed by the transferees. Assuming that to be so, still in my opinion, if the transferees, though they did not execute the transfers, accepted them, and the company recognised the transferees as accepting and acting on them, that, although an irregular transaction, could not be treated as a nullity, nor could the transfers be considered

inoperative. The object of requiring the transferee to execute was to satisfy the company that he agreed to take the shares. On the evidence it was apparent that the transferees did accept and act on the transfer, and that the company acted on the transfer and received the transferees as shareholders. In my opinion the transfers, though irregular, would not on this ground be ineffectual.

Then what took place in 1874? There was a voluntary winding-up. The voluntary liquidator, Mr. *Henry Beckwith*, did not treat these transfers as invalid, but treated the transferees as the owners of the shares. Two of them appeared and voted at the meeting which passed the resolution for a voluntary winding-up, and several at the meeting by which that resolution was confirmed. That is not all. The compulsory order under which we are now acting was made in 1877, on a petition presented by two of the transferees under the transfers which we are now asked to treat as invalid, *i.e.*, by persons who would have no title to be considered as shareholders except under those transfers. How then can we proceed in this winding-up without recognising them as shareholders? But if they are shareholders it cannot be said that the existing shareholders in respect of the shares which they hold are the persons who transferred them.

This, however, is not all. The winding-up has been going on ever since March, 1877, and it is not till 1880 that an attempt is made to treat the transfers as ineffectual, and to put the transferors on the list. In my opinion, where no fresh facts are discovered by the liquidator, the lapse of time that has occurred must be considered as barring this application. I do not say that even if there had not been that lapse of time (assuming the irregularity complained of to have been such as would have entitled the company to say they would not take the transfers), the application could have succeeded when the company, and successive liquidators who represented the company, have confirmed the transaction by treating these transferees as the holders of the shares parted with by those two gentlemen. But it is said that this is contrary to the decisions, especially to *Sand's Case* (1). In my opinion that case has no bearing on the present. There

(1) 32 L. T. (N.S.) 299.

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the question was whether the liquidator who had only put on the list the English shareholders, could, in order to satisfy the claims for contribution, put on the list Indian shareholders. There was no voidable transaction at all which could be alleged to be confirmed by his delay. The delay had simply been the not putting on the register of shareholders persons who had not attempted to get rid of their shares. They were persons liable, and persons who had not attempted to get rid of liability, or done anything capable of confirmation which could get rid of their liability and in which the liquidator had acquiesced. That is no authority against the view I have arrived at, and in my opinion the Vice-Chancellor was right in refusing to treat these gentlemen as still holders of these 1519 shares.

Then comes the question whether they ought to be put on the B list of contributories as past shareholders, a question upon which I am sorry that I differ from the other members of the Court. The question turns on what is the proper construction of sect. 38, sub-sect. 1, of the *Companies Act*, 1862. "No past member shall be liable to contribute to the assets of the company if he has ceased to be a member for a period of one year or upwards prior to the commencement of the winding-up." The question is what is the meaning of "the commencement of the winding-up." The Act does not shew that the Legislature contemplated the event that has happened here, that is a voluntary winding-up being put an end to by a compulsory order to wind up the company. The Act does talk of a supervision order being superseded by a compulsory order, but it does not talk of a voluntary winding-up being superseded. It contains only two sections relating to the commencement of the winding-up. One is the 84th section, which provides that "A winding-up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding-up." Under this it is quite clear that when there is a winding-up by the Court, and no other process of winding-up, the time of commencement is the presentation of the petition. The other is sect. 130, which refers only to the case of a voluntary winding-up, and provides that "A voluntary winding-up shall be deemed to commence at the time of the passing of the resolution authorizing such winding-up." A

winding-up under a supervision order is a mere continuance of the voluntary winding-up, and there of course the winding-up commences from the date of the resolution. In the 38th section nothing is said about compulsory winding-up or voluntary winding-up, and the question is what is the time of commencement under the present circumstances, where there was a voluntary winding-up commencing from the resolution long before the petition, and a subsequent order on the petition, which undoubtedly from that moment supersedes and puts an end to all proceedings under the voluntary winding-up. Now, it is to be observed that sect. 146 enables the Court where there is a winding-up by the Court to adopt any of the proceedings in the voluntary winding-up. It was put in the course of the argument, Suppose a B list of contributories was settled during the voluntary winding-up which would include all who had not parted with their shares for more than one year before the resolution, what would be the result? Could the Court adopt that list? It can hardly be suggested that it could not. If that be so, why is a difference of liability to ensue from the fact that the persons who were liable to be put on the list of contributories in the voluntary winding-up were not actually put on such a list before the winding-up order was made? In my opinion, on the proper construction of the 38th section, wholly irrespective of any considerations as to hardship, if there have been two winding-up proceedings which commence at different periods the company has been in winding-up, and the winding-up ought to be considered to have commenced from the commencement of the earlier proceeding, that is to say, in the present case, from the time when the resolution was passed that the company should be wound up voluntarily. I am therefore of opinion that, although if there had been nothing but the compulsory order these gentlemen could not have been put on the B list, yet as the winding-up commenced by voluntary process in 1874, and they had not then parted with their shares for a year, they must be considered as not being exempt from their liability as past members.

It is said that the Court has very often acted on the contrary view, and undoubtedly it has done so, but there is no decision on the point. The only case which bears on the point is *In re*

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United Service Company (1). That case, so far as it goes, appears to me to be in favour of the view I have expressed, for in making an order for continuing the winding-up subject to supervision and a subsequent compulsory order, the view of the Court evidently was, that notwithstanding the compulsory order the winding-up would still commence at the time when the voluntary resolution was passed. I do not, however, rely on that case, for the facts are not fully stated, and the reasons do not appear.

The case of *Thomas* v. *Patent Lionite Company* (2) was referred to as decisive, but I think that it has nothing to do with the present case. What the Master of the Rolls said appears more favourable to my view than to that of the other members of the Court, but the case decides nothing, because there was undoubtedly a continuing process of distress during the time of the compulsory winding-up, a process which had not been made effectual before the presentation of the petition. Therefore the case does not shew that the commencement of the winding-up was held by the Court to relate back to the voluntary resolution.

In my opinion on the true construction of sect. 38 the winding-up commenced on the 15th of January, 1875, and as these gentlemen, although they parted with their shares had not done so for a year before that period, they ought to be on the B list as past members.

LINDLEY, L.J. :—

In this case there are two points for us to consider, first whether these gentlemen ought to be put on the A list of contributories in respect to the 1519 shares. The first question with reference to that is whether the transfer from them was altogether void ; if it was there is an end of the case. I shall not go at length into this question, as we are all agreed upon it ; but I wish to observe that there is reason to believe that these shares were company shares put into the joint names of these gentlemen for some purpose of the company. They were indeed registered holders, and therefore if they had still been on the register they must have taken the consequences of being registered shareholders, but the inference which I am inclined to draw from the scanty materials

(1) Law Rep. 7 Eq. 76. (2) 17 Ch. D. 250.

before us, is that these gentlemen only held the shares for the company, and this conclusion has a material bearing on the question of the *bona fides* of the transfers from them.

Now Mr. *Marten* has satisfied me, by going very carefully through what took place on the 2nd of November, 1874, that there was a sufficient quorum to enable Mr. *H. Beckwith* to act under the delegated powers which there was authority to confer on him under art. 43. If that be so, we cannot say that this was an absolutely void transaction; it was at the most only irregular, unless we accede to the contention of Mr. *Buckley*, that the power to transfer was gone because the company was about to be wound up, in support of which he relied on *Chappell's Case* (1). That case appears to me wholly unlike the present. The view taken by Lord Justice *James*, and confirmed by Lord *Selborne*, as preferable to that of Lord Justice *Mellish*, was that the transfer was inconsistent with the scheme resolved upon, whilst Lord Justice *Mellish* did not think that it was. That was the foundation of the decision and does not apply here. Then treating the case as one of irregularity, in the first place I am not satisfied that there was any irregularity. The people who knew about it have not been cross-examined, and the only ground for supposing non-execution by the transferees is the statement in *H. Beckwith's* affidavit that all formalities were dispensed with. This may refer to art. 111. I do not know that it does, but I do not think that we can conclude from the hazy and unsatisfactory materials before us, that these transfers were not executed by the transferees. But let us assume that they were not. It would be an irregularity only. The transfers were acted upon, the transferors have been off the register for years and the transferees have been upon it, and having regard to the decisions on such points it appears to me that we cannot disturb what has been done and cannot put the transferors on the A list.

The question as to placing them on the B list is of more difficulty, and on this point I do not take the same view as Lord Justice *Cotton*. It is not necessary to go in detail through the *Companies Act*, as its effect is known to all of us. There are two primary methods of winding up which are sharply distinguished

(1) Law Rep. 6 Ch. 902.

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throughout the Act, namely, winding up compulsorily and winding up voluntarily. The third mode, namely, winding up subject to supervision, is only a variety of winding up voluntarily, and need not be noticed. Those two methods of winding up are contrasted and different sets of provisions are applicable to them, which must be borne in mind in considering sect. 38. [His Lordship read the section.] How are we to construe that section having regard to the double scheme of winding up which we find in the Act? I cannot construe it otherwise than in this way—in the event of a company formed under this Act being wound up compulsorily no person shall be liable to contribute who has ceased to be a member for a period of one year or upwards prior to the commencement of that winding-up; and in the case of a voluntary winding-up he is not liable if he has ceased to be a shareholder twelve months before the commencement of that winding-up. The commencement of each description of winding up is defined in the Act, sect. 84 providing that the commencement of the compulsory winding-up shall be the presentation of the petition, and sect. 130 saying that a voluntary winding-up shall be deemed to commence at the time of the passing of the resolution. That has been settled to mean, in the case of a resolution requiring confirmation, the passing of the confirmatory resolution. The Act therefore mentions two commencements of the winding-up, one adapted to one method of winding up and one adapted to the other. There is not in the Act any express provision as to the commencement of a compulsory winding-up preceded by a voluntary winding-up. Sect. 152 does not in terms hit that case, being addressed only to the case of a supervision order followed by a compulsory order. The reason for that omission seems to me to be this—no enactment that the order for compulsory winding-up should supersede a voluntary winding-up was needed; because when you come to work out practically the provisions of the Act which relate to compulsory winding-up, you find that they cannot be worked concurrently with the sections which relate to the voluntary winding-up; and supersession or stay of the proceedings in the voluntary winding-up is the inevitable consequence of the winding-up order. At the same time the Act shews on the face of it that the Legislature contemplated the case of a

voluntary winding-up being followed by a compulsory order, because there are provisions which relate to that subject. Sect. 145 provides that the voluntary winding-up of a company shall not be a bar to the right of any creditor of the company to have the same wound up compulsorily if the Court is of opinion that the rights of such creditor will be prejudiced by a voluntary winding-up; and sect. 146 provides that where a company is in course of being wound up voluntarily and proceedings are taken for the purpose of having it wound up by the Court, the Court may, if it thinks fit, notwithstanding that it makes an order directing the company to be wound up by the Court, provide in such order, or in any other order, for the adoption of all or any of the proceedings taken in the course of the voluntary winding-up. In neither section is there any provision as to the commencement of the winding-up. It occurred to me at one time that sect. 146 might be read as authorizing the Court in making the winding-up order to provide for the adoption of the resolution which forms the commencement of the voluntary winding-up, but on consideration I think that this would be a forced construction. The section does not mention the adoption of all or any of the proceedings "for or in the course of the voluntary winding-up," and I think that upon its true construction it must be taken to refer only to proceedings subsequent to the commencement of the winding-up. It would strain the words to include the actual resolution itself. Assuming this to be the right view, then, if there is a voluntary winding-up followed by a petition for a compulsory winding-up, the Court could not, in making the order for the compulsory winding-up, throw the commencement of the winding-up back, and make it date from the resolution for the voluntary winding-up. I quite see the force of the argument that if the voluntary winding-up had proceeded so far as that a B list of contributories had been settled and these gentlemen had been put on the B list, the Court when making an order for compulsory winding-up could have adopted that list, and that the rights of the parties ought not to be altered by the accident that the proceedings under the voluntary winding-up had not gone so far; but we must come back to what is the true construction of the Act, and I cannot concur in the view that Lord Justice *Cotton* expressed on that point.

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It is said there are two cases which favour that construction—*In re United Service Company* (1) and *Thomas* v. *Patent Lionite Company* (2). The former case is hardly an authority for anything, but I think that the chain of ideas which was running in the minds of those who suggested the making of that order was this: "We will preserve the voluntary winding-up by a supervision order. We will stay proceedings under that and go on under the compulsory order, so that we shall get in that way the benefit of the earlier commencement." Whether that was effectual or not I do not know. The point has never been discussed or decided, and I doubt whether it was effectual. If, indeed, sect. 146, according to its proper construction, enabled the Court to adopt the resolution to wind up as part of the proceedings, there would be more to be said in favour of the scheme. *Thomas* v. *Patent Lionite Company* appeared to me at first to go much further than I think it really does. In that case the distress was put in after the resolution to wind up voluntarily, and before the petition for the compulsory winding-up. The landlord was stopped, not, it is true, by an application under the *Companies Act*, which application, if made, would have been granted almost as a matter of course, but by a receiver and injunction in an action by debenture holders, and before anything else was done there was a compulsory winding-up order. It would be rather strong to say that the compulsory order had the effect of sweeping away all those proceedings and of putting the landlord in the position in which he would have been if he had been allowed to proceed. That was the argument addressed to the Court, and which the Court negatived. I am satisfied that the Court never intended to lay down the proposition that if a voluntary winding-up was succeeded by a compulsory order the winding-up was to date from the commencement of the voluntary winding-up. Sect. 84 was not discussed, for it did not bear on the point which the Court had to decide; and when that case is cited in support of the proposition for which Mr. *Hemming* and Mr. *Buckley* cited it, it is important to observe that this proposition was not the point discussed.

I will only add that this difficulty has been familiar to every-

(1) Law Rep. 7 Eq. 76. (2) 17 Ch. D. 250.

body who has had occasion to study the Act, which has now been in operation for twenty-one years, and I never before heard it suggested that in a case of this kind the commencement of the compulsory winding-up could be carried back to the commencement of the voluntary winding-up, though of course we have all heard methods suggested for avoiding the change in the commencement of the winding-up. I quite agree that that is not conclusive, but it shews that there has been a tacit consent that the 38th section does not admit of the construction now contended for. I think, therefore, that the appeal ought to be dismissed.

FRY, L.J.:—

There are two questions for decision in this case, one as to list A, and the other as to list B. It is contended that the transferors ought to be put on list A on the ground that the transfers were bad for several reasons. First, the articles of association require that the transfer should be executed by the transferee, and it is said that in this case the transfers were not executed by the transferees. Now, considering that the transfers had been acted upon some years when the proceedings for a compulsory winding-up were taken, it is incumbent on those who desire to shew that they were void to make out the case with distinctness. Instead of calling the attention of any witness to the question, they have thought fit to rely on the absence in the affidavits of any specific statement with regard to the execution by the transferees. In my opinion nothing is more dangerous than to say that a thing does not exist because it is not mentioned, except in cases where the thing would inevitably be mentioned if it existed. Long ago it was said that that argument would lead to the conclusion that *Tobit's* dog had no tail because the tail is not mentioned in the story of *Tobit*. That is precisely the line of argument which has been addressed to us in this case.

The second objection is this. It is said that the transfer was approved by Mr. *Henry Beckwith*, acting under the delegation of authority from the board, and it is said that delegation of authority to a single individual was invalid. It appears to me, however, to be plain that the 43rd article justifies the delegation of

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the powers of the board to a single individual, and that that delegation was made to Mr. *Henry Beckwith*. No doubt it is an extraordinary power, but it is contained in the articles, and no creditor can complain that it was exercised.

In the next place it was suggested, although hardly insisted upon at the end of the argument, that the board of directors had ceased to exist, for that the resignation of Mr. *Robinson* reduced it to less than a quorum, and, therefore, the delegating body having ceased, the power of the committee had gone with it. That argument failed when the facts were more carefully looked into; because it was apparent that Mr. *Boucher* remained a director of the company, and that, therefore, a quorum of two subsisted notwithstanding the resignation.

The last objection urged against those transfers was that which Mr. *Buckley* stated with great clearness. He said that where a liquidation is in contemplation to which the transferors are parties no transfer can be executed. In my judgment there is no authority for such a proposition. The cases relied upon were three. *Tennent* v. *City of Glasgow Bank* (1), in the House of Lords, only shewed the view of the Lord Chancellor to be that where a company was actually insolvent and had actually stopped payment, the power of transfer came to an end. The other two cases, *Chappell's Case* (2), and *Allin's Case* (3), only shewed a similar result where the company had agreed to assign the whole of its undertaking to another company, and the shareholders were to have shares in the new company in lieu of their shares in the old company. None of those cases is any authority for the proposition which Mr. *Buckley* urged before us.

Before passing from these transfers I desire to say that it is by no means clear to my mind that the transfers were fraudulent. It is to be borne in mind that the transferors did not transfer the shares which they held severally, and certainly the allegation which has been frequently repeated that the whole transaction was plainly fraudulent, has not in my judgment been sustained. But even assuming the transfers were not such as could originally have been insisted on, I am of opinion that the official liquidator

(1) 4 App. Cas. 615. (2) Law Rep. 6 Ch. 902.
(3) Law Rep. 16 Eq. 449.

who is the Appellant has precluded himself from this appeal. These transfers were acted upon as far back as the year 1874, the transferees became shareholders in the new company on the faith of those transfers, the transferees were put on the list of contributories of the new company, the winding-up meetings were attended by the transferees, and the resolution passed in their presence; they were put on the list of contributories in the old company when that was ordered to be wound up, calls were made upon them in that character, and for anything that appears they have made payments in respect of those calls. I think that under those circumstances it is impossible for us to accede to the contention that these transfers are now to be treated as invalid, even if they were irregular at the time they were registered, which in my judgment has not been made out.

The second question arises with regard to the B list, and turns on the construction of the 38th section of the *Companies Act*. The real question is what is the meaning in that section of the expression "the winding-up." In my judgment, as matter of mere construction, "the winding-up" must be referred to the introductory words at the commencement of the section "In the event of a company formed under this Act being wound up." Now as there are two modes of winding up, I think that the language must be read to apply to each of these modes as it arises, and therefore, that if the event is a winding-up voluntarily, then the commencement is the commencement of the voluntary winding-up, that if the event is the winding-up compulsorily, then the commencement is the commencement of the compulsory winding-up. In that conclusion I am fortified by the whole structure of the Act, on which I will say nothing except that I agree in every word which has fallen from Lord Justice *Lindley* on that point. I agree with him also in thinking that no prior decision has really touched the precise point before us. It has been suggested that considerable difficulties may arise from our conclusion, but to my mind they are less than what would follow from the opposite view. It must be borne in mind that a voluntary winding-up is the act merely of the shareholders themselves, a compulsory winding-up, especially when it follows a voluntary one, is usually the act of the creditors,

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and I am at a loss to see why creditors who have taken no step to assert their rights as such are to be benefited by the mere fact of a voluntary winding-up having subsisted. When they present their petition and obtain the order, the law gives them a year before the presenting of the petition during which they may go back against past members. I do not see why that privilege should be enlarged by the fact of there having been a voluntary winding-up at the instance of shareholders. I think that the inconveniences that would follow from the other construction are greater than those which flow from the construction at which I have arrived, though I do not say that difficulties may not arise from the latter construction. I think, therefore, the Vice-Chancellor is right on both points, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for Appellant: *Ingle, Cooper & Holmes.*
Solicitor for Respondents: *Sedgwick.*

H. C. J.

C. A. 1883 *Dec.* 7.

Ex parte MERRIMAN. *In re* STENSON.

Proof in Bankruptcy—Admission by Trustee—Application by Creditor to expunge—Locus Standi—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 20 *—Bankruptcy Rules*, 1870, *rr.* 67, 70—74.

A creditor who has proved a debt in a bankruptcy has an interest which entitles him to apply to the Court to expunge the proof of another creditor which has been admitted by the trustee.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

In the bankruptcy of *R. C. Stenson* a proof for £357 11*s.* 4*d.* was tendered by *Donald Nicoll*, and was admitted by the trustee on the 8th of December, 1882. On the 27th of April, 1883, *J. J. Merriman*, another creditor, who had proved a debt in the bankruptcy, gave notice to *Nicoll* of an application to the Court to expunge the proof. No notice of this application was served on the trustee. At the same time *Merriman* gave notice of an application to the Court to remove the trustee, on the ground,

inter alia, that he had improperly admitted *Nicoll's* proof. The two applications were set down for hearing on the same day. The application to remove the trustee was opened first, but, before it had been fully heard, the Registrar said that he thought the application to expunge the proof should be heard first. This was accordingly done, and that application was dismissed. The other application was then heard and dismissed. Though notice of the application to expunge the proof had not been served on the trustee, he was in fact present during the hearing of it.

Merriman appealed from the order dismissing the application to expunge *Nicoll's* proof, but not from the refusal of the other application. Notice of the appeal was served on the trustee as well as on *Nicoll*.

W. Willis, Q.C., and *Yate Lee*, for the Appellant.

Sidney Woolf, for *Nicoll*, took the preliminary objection that a creditor could not move to expunge the proof of another creditor which the trustee had admitted, at any rate without serving the trustee with notice of the application.

The COURT (*Cotton*, *Lindley*, and *Fry*, L.JJ.) held that, as the trustee was now present, it was immaterial that he had not been served with notice of the original application.

Sidney Woolf:—

Still the objection remains that the applicant had no *locus standi*. Before the *Bankruptcy Act*, 1869, proofs of debt could only be made at a meeting of creditors; now they are made by sending the affidavit to the trustee: *Bankruptcy Act*, 1869, s. 25, sub-s. 1; Bankruptcy Rules, 1870, rr. 67 (1), 70, 71, 72, 73, 74.

(1) Sect. 25 provides that "Subject to the provisions of this Act the trustee shall have power to do the following things (*inter alia*):—

"(1.) To receive and decide upon proof of debts in the prescribed manner, and for such purpose to administer oaths."

Rule 67: "A creditor may prove his debt at any duly summoned meeting of creditors, or at any time before the meeting, by delivering or sending through the post in a prepaid letter, before the appointment of a creditor's trustee, to the Registrar of the Court, and after the appointment of a creditor's trustee to such trustee, an affidavit according to the form in the Schedule."

Rule 70: "A Registrar in his capacity of trustee may admit proofs, and upon sufficient cause shewn, disallow

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Ex parte MERRIMAN. *In re* STENSON.

The decision of the trustee is final if no application is made to the Court to alter it within the fourteen days fixed by rule 74.

[COTTON, L.J. :—That is final as against the creditor who has sent the proof.]

The remedy of a creditor who desires to question the proof of another creditor is under sect. 20 (1). Under that section any creditor can call on the trustee to shew cause why he should not expunge a proof which he has admitted. Can it be intended that there should be a free fight among the creditors? that every creditor's hand should be against every other creditor, and this in the absence of the trustee whose decision is impugned? The bankrupt himself cannot apply to expunge a proof unless he can shew that there will be a surplus of his estate: *Ex parte Austin* (2). If the present application can be made, any bankrupt who has not got a surplus can evade this rule by getting a friendly creditor to make the application for him. In *Ex parte Sidebotham* (3) Lord Justice *James* said (4), "if there has been any misfeasance on

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any proof to which objection may be taken at the first or any other meeting of creditors."

Rule 71: "Where a trustee has been appointed by the creditors, the proofs of debt that have been received by the Registrar shall be given over to the trustee, but the Registrar shall make and file a list of such proofs on the proceedings."

Rule 72: "A creditor's trustee, as soon as may be after his appointment, and after the receipt of a proof of a debt, shall examine every proof and the grounds of the debt, and in writing reject or admit it, in whole or in part, or require further evidence in support thereof, and when he shall admit or reject any claim he shall give notice thereof in writing to the creditor, stating, in case of rejection, the grounds thereof."

Rule 73: "If at any time after the admission of any debt by the trustee he shall have reason to believe that such debt has been improperly admitted, he may apply to the Registrar upon affidavit setting forth the facts, for a day to be appointed for the Court to consider the propriety of expunging the proof or reducing the amount thereof."

Rule 74: "Any creditor dissatisfied with the decision of the trustee in respect of a proof, may, within fourteen days after the receipt of the notice from the trustee, apply to the Court to vary or reverse the decision, and the creditor shall give notice to the trustee thereof seven days before the day so fixed."

(1) Sect. 20 provides (*inter alia*) that "the bankrupt or any creditor, debtor, or other person aggrieved by any act of the trustee, may apply to the Court, and the Court may confirm, reverse, or modify the act complained of, and make such order in the premises as it thinks just."

(2) 4 Ch. D. 13.

(3) 14 Ch. D. 458.

(4) Ibid. 466.

the part of the trustee, the bankrupt or any creditor has a right, under sect. 20, to apply to the Court." That course was taken in the present case by applying for the removal of the trustee, and no appeal has been presented from the refusal of that application.

In *Ex parte Bacon* (1) Lord Justice *James* said (2), "In an ordinary case, no doubt, questions as to the amount of the proof of a creditor ought to be left to be dealt with by the trustee." In that case the bankrupt himself was allowed to apply to reduce the proof of a creditor, but only because an arrangement had been entered into under sect. 28, by which he undertook to pay the creditors a composition.

F. Cooper Willis, for the trustee.

COTTON, L.J. :—

I am of opinion that the preliminary objection must fail. Every creditor has an interest in seeing that proofs are not wrongly admitted. Any creditor has, no doubt, under sect. 20, a remedy against the trustee for corrupt conduct in the admission of a proof. In the present case the Appellant endeavoured to obtain the removal of the trustee on the ground that he had acted corruptly in admitting *Nicoll's* proof, and the trustee was acquitted of the charge. But the creditor still says that the proof has been erroneously admitted, and I am of opinion that he has an interest which entitled him to apply to the Court to expunge the proof, and which entitles him to appeal from the Registrar's refusal to expunge it. I do not say that the application ought not to have been made in the first instance to the trustee. But if the trustee still thinks that the proof should be admitted, he cannot well apply to the Court to expunge it.

LINDLEY and FRY, L.JJ., concurred.

The case was then heard on the merits, and an order was made reducing the proof by a small sum.

Solicitors: *Digby & Digby; C. Turner; Rooke & Sons.*

(1) 17 Ch. D. 447. (2) 17 Ch. D. 450.

W. L. C.

C. A.
1883
Dec. 14, 18, 21.

Ex parte SALTING. *In re* STRATTON.

Proof in Bankruptcy—Fraudulent Pledge by Partnership Firm—Other Security held by Pledgee—Separate Guarantee of one Partner—Marshalling Securities.

A partnership firm wrongfully pledged to their bankers, to secure a debt of the firm, the delivery warrants of some brandy which had been left in their custody in the ordinary course of business by the owner. One of the partners in the firm had no knowledge of the fraud. The debt due by the firm to the bankers was also secured by a separate guarantee of the innocent partner. The firm filed a liquidation petition, and the bankers sold the brandy, and applied the proceeds of sale in part payment of their debt. The owner of the brandy knew nothing of the pledge until the stoppage of the firm. The separate estate of the innocent partner was sufficient to pay all his separate creditors in full (including the balance remaining due to the bankers), and to leave a surplus :—

Held, that the owner of the brandy was entitled to have the bankers' securities marshalled, and, to the extent of the value of the brandy, to have the benefit of the guarantee, and to prove against the separate estate of the innocent partner.

Ex parte Alston (1) followed.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

J. L. Stratton and *P. L. Curtis* carried on business in partnership as merchants, in *London*, under the firm of *Warre Brothers*.

In July and August, 1877, *W. S. Salting* purchased of them eighty-five hogsheads and twenty-five quarter casks of brandy, for which he paid in September and October, 1877, and on the 19th of September, 1877, they sent him the invoices of the brandy, with a letter which stated that they held it on his account. The brandy remained in the docks, the delivery warrants being in the hands of *Warre Brothers*. They, in November, 1880, and at other times, without the knowledge of *Salting*, pledged nearly the whole of the warrants with their bankers, the *Union Bank of Scotland*, as security for moneys advanced to them by the bank, and placed to the credit of the current account of the firm. These pledges were made without

(1) Law Rep. 4 Ch. 168.

the knowledge of *Stratton*, who took no part in the management of the business of the firm. On the 4th of March, 1882, *Warre Brothers* filed a liquidation petition, under which the creditors resolved on a liquidation by arrangement, and appointed a trustee. At the commencement of the liquidation a large debt remained due from the firm to the bank, for which the bank held various securities in addition to the warrants of *Salting's* brandy. Among the securities held by the bank was a guarantee given to them by *Stratton* on the 1st of March, 1882, in the following terms: "I request you to continue business transactions with my firm of *Warre Brothers* to such extent as in your discretion you may deem fit, and I guarantee the due payment of all moneys which now are or hereafter may become due from my firm to you." In April, 1882, *Salting's* brandy was sold by the bank, and by means of the proceeds of this sale and of the proceeds of other securities held by them (not including *Stratton's* guarantee), they realised sufficient to pay a considerable part of the debt due to them from the firm. The separate estate of *Stratton* was sufficient to pay the balance remaining due to the bank, and also the value of *Salting's* brandy. *Salting* claimed to prove against the separate estate of *Stratton* for the amount realised by the sale of the brandy. It was admitted that *Stratton's* separate estate would be sufficient to pay his separate creditors in full, leaving a surplus to go over to the joint estate. The trustee rejected the proof, and his rejection was confirmed by the Registrar, on the ground that a proof in respect of a fraud committed by a partnership firm could not be allowed against the separate estate of an innocent partner. *Salting* appealed.

Davey, Q.C., *Cooper Willis*, Q.C., and *J. G. Wood*, for the Appellant:—

When a fraud has been committed by a partnership firm in the ordinary course of their business, the person who has been defrauded has, at any rate if the estate of the firm has received a benefit, a right to prove in respect of the value of the property of which he has been defrauded against the separate estate of any partner, even though that partner was innocent of the fraud. It is true there is no direct decision to this effect, and there are

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some observations of Lord Justice *James* in *Ex parte Adamson* (1) which are apparently to the contrary; but those observations were not necessary to the decision and do not amount to more than a *dictum*, and it is in accordance with principle that the right of proof against the separate estate should exist in such a case.

The trustee's contention is that the surplus of *Stratton's* separate estate should go over to the joint estate, the debt of which has been paid by means of *Salting's* brandy, and that *Salting's* right is only to get a dividend from the joint estate. This would be very unjust. If there had been no bankruptcy the partners would have been jointly and severally liable for the fraud; until bankruptcy occurs there is no distinction between joint and separate estate: *St. Aubyn* v. *Smart* (2); *Blair* v. *Bromley* (3); *Brydges* v. *Branfill* (4); *Atkinson* v. *Mackreth* (5); *Plumer* v. *Gregory* (6); *De Ribeyre* v. *Barclay* (7); *Western Bank of Scotland* v. *Addie* (8); *Cleather* v. *Twisden* (9). The present case is not like that of a trustee, who happens to be a member of a firm, employing his trust money in the business of the firm. In such a case, no doubt, the other partners cannot be made liable for the breach of trust, unless it is shewn that they were privy to it: *Ex parte Geaves* (10); *Ex parte Heaton* (11). In the present case the firm were, in the ordinary course of business, intrusted with the brandy.

As to the innocence of *Stratton*, it ought, as regards third parties, to be assumed that he knew the contents of the partnership books: *De Ribeyre* v. *Barclay*; *Marsh* v. *Keating* (12).

Winslow, Q.C., *Marten*, Q.C., and *F. W. Hollams*, for the trustee.

[COTTON, L.J.:—Does not *Ex parte Alston* (13) apply? In that case some factors wrongfully pledged coffee which had been

(1) 8 Ch. D. 807.
(2) Law Rep. 5 Eq. 183; S.C. 3 Ch. 646.
(3) 5 Hare, 542; S.C. 2 Ph. 354.
(4) 12 Sim. 369.
(5) Law Rep. 2 Eq. 570.
(6) Law Rep. 18 Eq. 621.
(7) 23 Beav. 107.
(8) Law Rep. 1 H. L., Sc. 145.
(9) 24 Ch. D. 731.
(10) 8 D. M. & G. 291.
(11) Buck. 386.
(12) 2 Cl. & F. 250.
(13) Law Rep. 4 Ch. 168.

consigned to them, together with securities of their own, to secure a debt of their own. The pledgee sold the coffee and applied the proceeds in payment of his debt. In the subsequent bankruptcy of the partners it was held that the owner of the coffee was entitled to a lien on the other securities held by the pledgee for the value of the coffee. Why should not *Salting* have the benefit of the guarantee given by *Stratton* to the bank?

FRY, L.J.:—Would not *Salting* have a right to require the bank to enforce the guarantee before resorting to his brandy?]

Salting's property was pledged without *Stratton's* knowledge, and the guarantee was given long afterwards. *Salting* cannot stand in a better position than if he was a co-surety with *Stratton* to the bank for the debt of the firm; in that case his utmost right would be, if he had paid more than his proportion of the debt, to call on his co-surety to contribute.

[COTTON, L.J.:—I do not think he can be treated as a surety in that sense.

FRY, L.J.:—Suretyship arises out of contract, not from tort.]

Ex parte Alston (1) does not apply. There the other securities held by the pledgee belonged to the firm; here the other security is a separate guarantee given by one partner. The decision in *Ex parte Alston* was founded on *In re Westzinthus* (2) and *Broadbent* v. *Barlow* (3). The principle of those cases has no application here. The doctrine of marshalling has never been carried to the extent now suggested, it applies only in favour of creditors holding securities of the same debtor: *Ex parte Kendall* (4). There is no evidence that the bank ever acted on the guarantee, by giving the firm further advances. Why should *Salting* have a preference over the other creditors of the firm? Such a preference has been allowed only in the case of a personal fraud by the partner against whose estate the right of proof is claimed.

COTTON, L.J.:—

I am of opinion that this proof ought to be allowed against Mr. *Stratton's* separate estate. We give no opinion upon the

(1) Law Rep. 4 Ch. 168.
(2) 5 B. & Ad. 817.
(3) 3 D. F. & J. 570.
(4) 17 Ves. 514.

7 Jur. N.S. 479

C. A. 1883 *Ex parte* SALTING. *In re* STRATTON. Cotton, L.J.

question whether, independently of the circumstances I am about to mention, there would be any right of proof against the separate estate, though we in no way intimate any opinion that there would not. But the state of circumstances was this, Mr. *Salting's* brandy was pledged to the bank for a debt of the firm, and afterwards Mr. *Stratton* gave his individual personal guarantee to the bank for that same debt. It was suggested by Mr. *Marten* that the guarantee had not been acted upon by the bank. In fact it had, for they continued the account, not calling in the debt due to them, as they might have done, which would at once have put a stop to the account. Then what is it? The debt to the bank was a debt of the firm, and for that debt Mr. *Stratton* has given his guarantee to the bank, which would give the bank a right of proof against his separate estate. Instead of having recourse to that guarantee, the bank have paid themselves by selling the property of Mr. *Salting*. In that state of circumstances he stands in the position of a surety, that is to say, his property has been taken to pay another person's debt, and, in my opinion, he is entitled to say that any other security, which the bank, who have thus applied his property, hold, should be applied for his benefit. This will give him, upon the guarantee of Mr. *Stratton*, and in no other way, a right of proof against the separate estate.

LINDLEY, L.J.:—

I also think that this appeal ought to be allowed on the principle of *Ex parte Alston* (1), which I confess as soon as I understood the facts, seemed to me to apply. Mr. *Marten*, I think, is quite right in saying that it is a question between competing creditors. The separate estate of Mr. *Stratton* has been in fact increased by the value of Mr. *Salting's* brandy. Well, that separate estate is able to pay every proper demand upon it twenty shillings in the pound, and now we are asked by the trustee to say that the surplus of that separate estate shall go to the joint creditors, in other words, that the joint creditors shall have the benefit of Mr. *Salting's* brandy. That is as plainly as possible paying one man's debt with another man's property.

(1) Law Rep. 4 Ch. 168.

It appears to me that the principle of *Ex parte Alston* (1) applies, and that the appeal ought to be allowed.

FRY, L.J.:—

I am of the same opinion. The only distinction suggested between the present case and *Ex parte Alston* is in the nature of the security given to the bank. It appears to me that a guarantee by one partner for the debt of the firm, which gives the creditor a right of proof against the separate estate of that partner, in addition to his right of proof against the joint estate of the partnership, is a security within the meaning of the principle laid down in *Ex parte Alston*, and I entirely agree in the view taken by the other members of the Court.

Solicitors for Appellant: *W. & J. Flower & Nussey.*
Solicitors for Trustee: *Hollams, Son, & Coward.*

(1) Law Rep. 4 Ch. 168.

W. L. C.

KAY, J.
1883
Nov. 6, 10.

In re CADOGAN.
CADOGAN *v.* PALAGI.

[1882 C. 3934.]

Will—Construction—Bequest of "the money of which I am possessed."

In construing a will no absolute technical meaning should be given to such a word as "money," the meaning of which must depend upon the context, if any, and such surrounding circumstances as the Court can take into consideration.

A testatrix who was possessed of cash, securities, leaseholds, furniture, and effects, by her will, made in expectation of her death, which occurred two days after its date, gave "one half of the money of which I am possessed to *H.*, and the remainder equally between *O.* and *S*, and after them to their children":—

Held, that the word "money" passed all the personal estate.

FURTHER CONSIDERATION of an administration action.

The will of *Mary Cadogan*, made on the 13th of April, 1882 (two days before her death), was in the following words, viz: "I leave one half of the money of which I am possessed to my sister *Honoria Frances Cadogan*, and the remainder to be divided equally between my sisters, *Olivia Georgina*, Countess *Palagi*, and *Sophia Harriett Isabella Brichieri Colombi*, and after them to their children."

The testatrix died on the 15th of April, 1882; she was a spinster, and her three sisters named in the will, and a half-brother, Mr. *Horace Cadogan*, were her sole next of kin.

At her death she was possessed of (*a*) £270 16*s.* 1*d.* cash at her bankers; (*b*) between £4000 and £5000 invested on various securities, such as Bank of *England* stock, *London, Brighton, and South Coast Railway* debenture stock, and *London and South Western Railway* preference stock; (*c*) one fourth share of two leasehold messuages; (*d*) one fourth share of the proceeds of the sale of a freehold messuage subject to a trust for sale; and (*e*) certain furniture and effects valued at £121 15*s.* 6*d.*

Letters of administration with the will annexed had been granted to the Plaintiff *Honoria Frances Cadogan*; an administration order in the usual form had been made in this action under the Rules of Court, 1875, Order XV., rule 1; and the Chief

Clerk having made his certificate, the question now was how much of the personal property of the testatrix passed by her will.

Kekewich, Q.C., and *Cecil Austin*, for the Plaintiff:—

Although the word "money" has in some cases received a restricted construction, where, for instance, there have been other gifts, shewing that the testator did not intend by the expression his "money" to pass all his personal estate (of which *Lowe* v. *Thomas* (1) is an example), it must in this case be held to have that effect. For the fact that the testatrix settled one half of what she bequeathed upon two persons in equal shares and after them upon their children supplies a context, and shews that this lady, who had considerable personal property and made her will two days before her death, could not have intended to die intestate as to everything except the actual cash of which she was possessed. They cited *Prichard* v. *Prichard* (2).

[KAY, J., referred to *Byrom* v. *Brandreth* (3).]

Bathurst, for the Countess *Palagi* and Madame *Brichieri Colombi*:—

There is nothing here, as there was in *Byrom* v. *Brandreth*, to make the word "money" an ambiguous expression, and the testatrix has clearly used it in its popular and colloquial sense, as meaning her entire personal estate: *Dowson* v. *Gaskoin* (4); *Waite* v. *Combes* (5).

W. Druce (with him *Graham Hastings*, Q.C.), for Mr. *Horace Cadogan*:—

The word "money" taken by itself must upon the authorities be restricted to its proper meaning, *i.e.*, actual cash, and there is here no sufficient context to give it any other meaning. The testatrix accordingly died intestate except as to the cash at her bankers, and the rest of her personal estate goes to her next of kin: *Williams* v. *Williams* (6); *Larner* v. *Larner* (7).

(1) Kay, 369; 5 D. M. & G. 315.
(2) Law Rep. 11 Eq. 232.
(3) Ibid. 16 Eq. 475.
(4) 2 Keen, 14.
(5) 5 De G. & Sm. 676.
(6) 8 Ch. D. 789.
(7) 3 Drew. 704.

17 Jur 155.

11 Sc 18 Jur 563.

C. A. 1883 — *In re* CADOGAN. CADOGAN *v.* PALAGI.

1883. Nov. 10. KAY, J. (after stating the facts as above), continued:—

The question is how much of the personal property of the testatrix passed by her will.

On the one hand it is argued that the word "money" has a limited meaning, and that I am bound by authority to hold that this lady died intestate as to all such part of her personal estate as cannot be strictly so described.

On the other hand it is said, quite truly, that there is a popular and colloquial use of the word "money" which is equivalent to personal property, and that in this will this larger meaning should be given. Speaking for myself, I must say I have not the smallest doubt that the testatrix used the word in that larger sense, and I believe that would be the opinion of any person not a lawyer who read this will.

Am I bound by authority to decide otherwise? There is not here any appointment of executor nor any charge of funeral expenses or debts which would bring the case within the authority of *Legge* v. *Asgill* (1), *Rogers* v. *Thomas* (2), or *Dowson* v. *Gaskoin* (3). But the question is whether I have not from the terms of the will and the attendant circumstances a sufficient indication that the intention of the testatrix was to make a complete disposition of all her personal property so as to bring the case within the class of decisions of which *Waite* v. *Combes* (4) and *Prichard* v. *Prichard* (5) are examples.

There is not in this will any subsequent gift of legacies pecuniary or specific upon which stress has been laid to restrict the meaning of the word "money" as in *Lowe* v. *Thomas* (6) and *Byrom* v. *Brandreth* (7).

In the case of a will made not in expectation of immediate death the state of the personal property at the testator's death affords little if any assistance in construing his will. But where such a will as this is made by a person in a last illness with the expectation of death, as I must infer was the case, and the death

(1) T. & R. 265, n.
(2) 2 Keen, 8.
(3) Ibid. 14.
(4) 5 De G. & Sm. 676.
(5) Law Rep. 11 Eq. 232.
(6) 5 D. M. & G. 315.
(7) Law Rep. 16 Eq. 475.

follows within a few days, the state of the property cannot be disregarded.

If I adopt the narrower construction nothing would pass but the £270 in the bank at the date of the death. This was so soon after the date of the will that probably the testatrix had little if any more when her will was made. Can it be that she intended to leave only such cash as she had at her bankers, being but a small part of her property, among her three sisters, and that she intended to give two of them life interests in their shares with remainder to their children, and to die intestate as to the rest of her personalty? I cannot bring myself to a conclusion which seems to me so absurdly improbable. I am not only at liberty but I am bound to give a liberal interpretation to the words to avoid an intestacy, and for these reasons I feel compelled to hold that the lady used the word "money" in this will in the popular sense as a description of all her personal estate, and I do not think that any of the cases have laid down a rule which prevents that construction.

I do not forget that part of the personal estate consists of leaseholds and furniture, property which is not aptly described by the word "money." But I am of opinion that I cannot exclude these, because the choice seems to me to be between construing "money" to mean "cash at the bank" or "personal estate," and on the whole I think the latter the true construction.

One of the cases I have mentioned, *Prichard* v. *Prichard* (1), is, I think, an authority for this, so far as a decision upon one will can help in construing another. Leaseholds and furniture and all the personal estate it was there held passed by similar words. That case is at least an expression of opinion, in which I respectfully concur, that there should be no absolute technical meaning given to such a word as "money" in a will, but that its meaning in every case must depend upon the context, if there is any, which can explain it, and upon those surrounding circumstances, which the Court is bound to take into consideration in determining the construction.

Solicitors: *Bennett, Dawson, & Bennett.*

(1) Law Rep. 11 Eq. 232.

W. W. K.

KAY, J.

1883

Dec. 8, 14.

MELLOR *v.* PORTER.

[1883 M. 2535.]

Equitable Mortgage—Foreclosure—Mortgagor's Estate in infant Heir-at-Law—Day to shew Cause—Form of Decree.

In an action by an equitable mortgagee, without any memorandum of deposit of title deeds, against the widow and infant heir-at-law of the mortgagor for foreclosure:—

Held, on motion for judgment, the Defendants not having appeared, that the infant heir must be ordered to convey the estate when he attained the age of twenty-one years, and that he must have a day to shew cause in the usual way.

Price v. *Carver* (1) followed.

MOTION FOR JUDGMENT.

The action was by a mortgagee for the realisation of an equitable mortgage created by a deposit of the title deeds, without any memorandum, by *William Presbury*, the mortgagor, who had since died intestate. The Defendants were the mortgagor's widow and his heir-at-law, who was an infant. The Defendants had not entered appearance.

W. Renshaw, for the Plaintiff, moved for judgment in default of appearance, and asked for a decree in the form directed in the case of *Foster* v. *Parker* (2). *Seton* on Decrees (3), *Trustee Act*, 1850 (13 & 14 Vict. c. 60), s. 30, *Fisher* on Mortgages (4), *Bowra* v. *Wright* (5), the statute 11 Geo. 4 & 1 Will. 4, c. 47, ss. 10, 11, *Price* v. *Carver*, and *Newbury* v. *Marten* (6), were also referred to.

KAY, J., after stating the facts, said:—

The question is whether in the ordinary decree, which is otherwise a matter of course, there should be contained what is commonly known as a day to shew cause, that is to say, leave

(1) 3 My. & Cr. 157.
(2) 8 Ch. D. 147.
(3) 4th Ed. vol. ii., part 1, p. 1114, and see pp. 713, 714 and cases there referred to.
(4) 3rd Ed. p. 1085, sect. 1745.
(5) 4 De G. & Sm. 265.
(6) 15 Jur. 166.

reserved to the infant on being served with a subpœna to shew cause against the judgment within six months after his coming of age. By 11 Geo. 4 & 1 Will. 4, c. 47, s. 10, the right of parol demurrer on behalf of an infant defendant was taken away, and by sect. 11, in case of a decree for sale for payment of debts, the infant may be made to convey, and the conveyance will have the same effect as if he were of full age.

But in *Price* v. *Carver* (1), which was a suit to foreclose an equitable mortgage, the Lord Chancellor said that the parol demurring and the day to shew cause were entirely different. In the one case nothing is done to affect the infant, but when a day is given the decree is complete, subject only to his shewing cause against it within the time allowed, and the decree gave to the infant a day to shew cause. Accordingly it has always been held that the old practice of giving a day to shew cause in an action for foreclosure, *Williamson* v. *Gordon* (2), or where the decree directed the infant to perform any act, *Walsh* v. *Trevannion* (3), was not affected by that statute except in the special case thereby provided for. The later statute, 2 & 3 Vict. c. 60, which extended those provisions to the case of a mortgage as well as a sale of an infant's estate, does not affect this question. The *Trustee Act*, 1850 (13 & 14 Vict. c. 60), ss. 20, 29, 30, enables the Court where there has been a decree for sale or conveyance to declare persons bound by such decree to be trustees, and to make a vesting order or appoint some one to convey their interests, and as this power is expressly given, even as to the interests of unborn persons, it is difficult to see why the statute does not apply to the case of an infant defendant. In *Newbury* v. *Marten* (4) Lord *Cranworth* held that in the common decree for foreclosure there must be a day to shew cause notwithstanding the 7th and 8th sections of that statute, which relate to mortgagees. According to the report, no reference was made to the 30th section. The common decree for foreclosure in the case of a legal mortgage would not contain an order for conveyance, and this is probably the reason why the 30th section was not referred to. But in the case of an equitable mortgage, as the foreclosure

(1) 3 My. & Cr. 157.
(2) 19 Ves. 114.
(3) 16 Sim. 180.
(4) 15 Jur. 166.

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alone would not vest the legal estate, although the judgment should be in terms for foreclosure, it is usual to direct a conveyance by the defendant: *Lees* v. *Fisher* (1).

Foster v. *Parker* (2), before the late Master of the Rolls (Sir *George Jessel*), was an action for foreclosure against the infant heir to whom the estate descended by reason of the disclaimer of the trustees of the will, and he was consequently simply a trustee. In a later case of *Backhouse* v. *Hornsey*, heard on the 20th of December, 1880, a note of which has been furnished to me by the Registrar, the same Judge decided that where the infant had the legal estate he must in a decree for foreclosure against him have a day to shew cause, the Master of the Rolls professing to follow *Newbury* v. *Marten* (3). According to the Registrar's note his Lordship stated that in his opinion it was a useless practice, but must be altered, if at all, by Act of Parliament. If the infant had the legal estate the mortgage must have been equitable, and the decree would direct a conveyance, and this is therefore an express decision that the 30th section of the *Trustee Act* does not apply. This is not following *Newbury* v. *Marten*, because in that case the mortgage being legal there would not be a direction to convey. I have looked at the record in the case of *Backhouse* v. *Hornsey*. It was clearly a case of an equitable mortgage, and the decree contains a direction that the "infant defendants upon their attaining twenty-one execute a proper conveyance to the plaintiffs to be settled by the Judge in case the parties differ," and it gives them a day to shew cause: (Registrar's Book, 1879, A. p. 1459). The words which I have quoted are inserted by an interlineation, and it appears from a communication which the Registrar has been so good as to make to me, that the matter was the subject of conversation with the Master of the Rolls, and the form seems to have been adopted from what was said in *Price* v. *Carver* (4) and the cases there cited, and from the form of the decree in that case at p. 164. Obviously a direction to convey when the infant attains twenty-one would not authorize the Court to declare him a trustee before that age.

(1) 22 Ch. D. 283.
(2) 8 Ch. D. 147.
(3) 15 Jur. 166.
(4) 3 My. & Cr. 157.

But in other cases, as in a decree for partition or sale under the *Partition Acts*, the practice seems to be to direct a conveyance at once by an infant defendant, and then to declare him a trustee without giving him a day to shew cause. However, in the case of a legal mortgage where an infant defendant has only an equitable interest, as the decree against him for foreclosure would not direct him to convey, the old practice of giving him a day to shew cause remains unaffected: *Newbury* v. *Marten* (1); and it seems somewhat irrational that he should have a day to shew cause in that case and not where he has the legal estate. My opinion is that the 30th section of the *Trustee Act* ought to be held to apply to all cases where there is a judgment against an infant for an immediate conveyance, but this is not the form of a judgment for foreclosure in the case of an equitable mortgagee.

I must follow *Price* v. *Carver* (2) and the decision of the Master of the Rolls by directing the infant to convey when he attains twenty-one, and by giving him a day to shew cause in the usual way. This I understand is now the ordinary form of judgment in the case of foreclosure of an equitable mortgage.

Solicitors: *Satchell & Chapple*, agents for *J. & H. F. Gadsby, Derby.*

(1) 15 Jur. 166.

(2) 3 My. & Cr. 157.

T. F. M.

CHITTY, J.
1883
Nov. 19.

In re JACKSON.
SHIERS *v.* ASHWORTH.

[1880 J. 2.]

Will—Construction—Gift to Individuals or to a Class—Personæ designatæ.

Bequest of residue "In trust for my son *George*, my daughters *Lydia*, *Mary Ann*, *Alice*, and *Frances*, and such of my child or children, if any, hereafter to be born as shall attain the age of twenty-one years or marry, in equal shares as tenants in common, but subject, as to the share of any daughter, whether now living or a child hereafter to be born, to the trusts following—" the share of "such daughter" being settled.

The testator had six children only, the five named and one other, all of whom had attained twenty-one at the date of the will. Of the named children two died in the testator's lifetime without issue, and three survived him:—

Held, that the five named children took as a class and not as individuals, and that the whole residue was divisible among the three who survived the testator.

Re Stanhope's Trusts (1) followed.

JOHN JACKSON, by his will, dated in 1855, devised and bequeathed his residuary real and personal estate to trustees in trust for sale and conversion, and to stand possessed of the proceeds "In trust for my son *George Jackson*, my daughters *Lydia Shiers*, *Mary Ann Ashworth*, *Alice Farrar*, and *Frances Jackson*, and such of my child or children, if any, hereafter to be born as shall attain the age of twenty-one years or marry, in equal shares as tenants in common, but subject, as to the share of any daughter whether now living or a child hereafter to be born, to the trusts following." The testator then proceeded to declare trusts of the share of "such daughter" for the benefit of herself and her children.

At the date of his will the testator had, besides the five children above named, a sixth child, *Thomas Jackson*, and all the children had then attained twenty-one.

The testator died in 1860, without having had any other children.

(1) 27 Beav. 201.

Two of the children named in the will, *George Jackson* and *Frances Jackson*, died in the testator's lifetime without having been married. The three others named were living at his death, but two of them, *Lydia Shiers* and *Alice Farrar*, had since died.

The question was whether the residuary gift should be read as a gift to individuals, so that the shares of the children who predeceased the testator would lapse, or as a gift to a class, in which case the three named children who survived the testator would take the whole.

Ince, Q.C., and *Byrne*, for the Plaintiff, the husband and legal personal representative of *Lydia Shiers*:—

We submit that the five children named took as a class, and that those three who survived became entitled to the whole residue absolutely: *Re Stanhope's Trusts* (1); *Dimond* v. *Bostock* (2).

[CHITTY, J., referred to *Drakeford* v. *Drakeford* (3).]

Romer, Q.C., *Ryland*, *A. Bailey*, *S. Hall*, *Hamilton Humphreys*, and *C. H. Turner*, for other parties representing the surviving children, took the same view.

[They referred to *Jarman* on Wills (4).]

T. Brett, for the legal personal representatives of the testator's third wife, who survived him:—

I submit that the two children who predeceased the testator are included in the gift, and that their shares having lapsed, and there being an intestacy as to those shares, they belong to the testator's next of kin. This is not a gift to a class of persons but to certain specified individuals. *Havergal* v. *Harrison* (5), *Re Chaplin's Trust* (6), commented on in *Jarman* on Wills (7), and followed by the late Master of the Rolls in *In re Allen* (8), are authorities that a gift to persons *nominatim*, is to be read as a gift to them as individuals. In the present case there is a clear *designatio personarum*. It is to be noticed that there are two

(1) 27 Beav. 201.
(2) Law Rep. 10 Ch. 358.
(3) 33 Beav. 43.
(4) 4th Ed. vol. i. pp. 268, 269.
(5) 7 Beav. 49.
(6) 12 W. R. 147; 33 L. J. (Ch.) 183.
(7) 4th Ed. vol. i. p. 269, note (*n*).
(8) 29 W. R. 480.

CHITTY, J. 1883 *In re* JACKSON. SHIERS *v.* ASHWORTH.

distinct classes of persons described in the gift: first, the five children named, who had all attained twenty-one at the date of the will and were to take in any event; and, secondly, the after-born children, if any; but the latter were to take only in the event of their attaining twenty-one or marrying, the gift to the five named children being free from that contingency. This distinguishes the case from *Re Stanhope's Trusts* (1).

Ince, in reply:—

Re Chaplin's Trust (2) and *In re Allen* (3) were cases in which the objects of the gift did not all stand in the same relation to the testator; but here the gift is to a class of persons all filling one common character, namely, that of children of the testator. This distinction is pointed out by Vice-Chancellor *Wood* in the former case, and recognised by the Master of the Rolls in the latter.

CHITTY, J.:—

The question is, what is the true construction of the residuary gift in this will. At the date of the will the testator had six children living, all of whom had attained twenty-one, and of whom five are named in the residuary clause; but one, *Thomas*, is not named; and the testator had an expectation apparently, or anticipated, that there might be other children born. Two of the children who are named in the clause, *George* and *Frances*, died before the testator, and the substantial question I have to decide is whether their shares lapsed.

The form which the argument has taken, and rightly taken in my opinion, has been this, whether this is a gift to a class or not. If it is a gift to individuals *quoad* the five who are named, then the ordinary rule as to lapse must apply; it is a gift to them *nominatim*. I may mention that the 33rd section of the *Wills Act* has some bearing on the clause, although not in the particular events that have happened, because both *George* and *Frances* have died without issue. The authorities on the 33rd section have decided that where the gift is to individuals the 33rd section applies, but that where it is a gift to children as a class the

(1) 27 Beav. 201. (2) 12 W. R. 147; 33 L. J. (Ch.) 183.
(3) 29 W. R. 480.

33rd section does not apply. Upon the question as to what is the true meaning of this will, Sir *John Romilly* has, in my opinion, properly laid down the principle in the case of *Re Stanhope's Trusts* (1)—I mean so far as a principle is applicable to the case of the particular will before me. Here the testator says, "In trust for my son *George Jackson*, my daughters *Lydia Shiers*, *Mary Ann Ashworth*, *Alice Farrar*, and *Frances Jackson*, and such of my child or children, if any, hereafter to be born as shall attain the age of twenty-one years or marry, in equal shares as tenants in common, but subject, as to the share of any daughter whether now living or a child hereafter to be born, to the trusts following." Then follows a settlement of a daughter's share, apparently whether she be one of those named or whether she be one of those who take under that part of the gift which relates to children thereafter to be born.

Now Sir *John Romilly*, in *Re Stanhope's Trusts*, acted upon the principle that a testator could make a gift in effect to a class, if from the form of the gift—and it is a question of form—the legatees are to take as a class. That a question of this kind must depend upon the form of the gift is plain. A mere gift by a testator to all his children by name is clearly not a gift to them as a class. Sir *William Page Wood*, in *Re Chaplin's Trust* (2), in substance referred to a class by what may be called the more or less scientific definition; that is to say, not the definition which is usually adopted in the cases at law upon the subject. He says that a gift to a class is a gift to a set of persons all filling one common character or holding some definite position; that is to say, it must be a gift to them as a class of persons having some common attribute and not a gift to them as individuals.

Generally speaking, the cases with reference to a set or class of persons have been decided according to the terms which have been used. A gift to "my children" is a familiar instance: it means persons holding a common relation to the testator. The same with regard to a gift to nephews and nieces. It is settled law that a gift is not the less a gift to a class because you name a particular individual. I may give as an instance a gift to "all my children including *John*." As Sir *George Jessel* put it in

(1) 27 Beav. 201.

(2) 12 W. R. 147; 33 L. J. (Ch.) 183.

CHITTY, J.
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In re JACKSON. SHIERS *v.* ASHWORTH.

In re Allen (1), a testator may, simply by way of precaution, name an individual in the class description because he may have some suspicion that the individual is illegitimate, or something of that kind. Including in a general description a certain person as a member of a class where the testator himself treats that person as a member of that class, and naming him individually in the gift itself, does not make the gift less a gift to a class. These seem to me to be the ordinary principles which ought to apply to this case.

In *Re Stanhope's Trusts* (2) Sir *John Romilly* held that the particular gift I am about to read was a gift to a class, though that was not so strong a case on the facts as the case before me. The testator there used these words in his will: "In trust to and for the use and benefit of my daughters, *Harriet*, *Maria*, *Charlotte*, and *Amelia*, and their issue. And it is my wish and intention that if my said dear wife shall have a daughter or daughters by me either born in my lifetime or within due time after my decease, that she or they shall be equally entitled with my said daughters *Harriet*, *Maria*, *Charlotte*, and *Amelia*, in and to the residue of my estate and effects and the dividends and interest thereof. Now I do will and direct that all and every daughter and daughters that my said wife *Sarah Slott Stanhope* shall have by me, and which shall be born either before my decease or in due time after, and the issue of their body and bodies respectively, shall and may be entitled to equal parts and shares, or an equal part and share with my said daughters," and so forth. The form of that gift was first, apparently, a gift to four living daughters by name, and then came in by way of rider a general direction that the after-born daughters should take. In point of form there is little or no distinction between that case and the present as far as the form goes, though the form in the case before me is rather more favourable to those who contend for a gift to a class.

There is only one thing more which I ought to point out. In *Re Stanhope's Trusts* there was no qualification requiring that the after-born daughters should attain twenty-one or marry, whereas in the case before me there is such a qualification; but, as I have

(1) 29 W. R. 480. (2) 27 Beav. 201.

already stated, all the children who are named had attained twenty-one. Therefore it appears to me that there is no real ground on this point for making any distinction between the two cases.

I think the fair reading of this clause is, that it is a gift to the testator's children—some of whom have attained twenty-one, and as to whom it is necessary that they should have attained twenty-one—and to his children hereafter to be born when they shall have fulfilled the same condition as to attaining twenty-one. The children who are living at the date of the will are to share equally with those who are after-born, and no distinction whatever is made between them.

There is one point that I have not yet referred to, and that is that *Thomas* is not mentioned. I read this as equivalent to a gift "to my present living children, except *Thomas*, and my after-born children." If that be so, the exception of *Thomas* who is a member of the class, does not make it the less a class. It is settled that the exclusion of a person from a class is not sufficient to render the gift not a gift to a class. As I have said, I think there is good sense as well as principle in the decision of *Re Stanhope's Trusts* (1).

The other cases which have been cited of *In re Allen* (2) and *Re Chaplin's Trust* (3) have little or no bearing on the question. In *Re Chaplin's Trust* the persons who were to take concurrently with "the children of my late cousin" were persons who in no sense possessed a common attribute; that is to say, they were persons who stood in a different relation to the testator altogether; and a similar observation might be made with reference to *In re Allen*. The late Master of the Rolls in giving judgment in that case points that out. He says (4), "It may be held that the mere naming of an individual, who would otherwise have been included in the class, did not alter the rule of construction. But that cannot apply to the case before me, where the individual in question would certainly not be included amongst the children of *Robert Wilson*, she being a grandchild."

(1) 27 Beav. 201.
(2) 29 W. R. 480.
(3) 12 W. R. 147; 33 L. J. (Ch.) 183.
(4) 29 W. R. 480.

CHITTY, J. 1883 *In re* JACKSON. SHIERS *v.* ASHWORTH.

I therefore hold that this is a gift to a class, and that the residue is divisible between the three children named in the will who were living at the testator's death.

Solicitors: *Byrne & Lucas*, agents for *Taylor, Kirkman, & Colley, Manchester; Phelps, Sidgwick, & Biddle; Chester & Co.; Dangerfield & Blythe; Clarke, Woodcock, & Ryland; Jarvis & Triscott.*

G. I. F. C.

CHITTY, J. 1883 *Dec.* 1, 3.

Ex parte MAIDSTONE AND ASHFORD RAILWAY COMPANY.
Ex parte BALA AND FESTINIOG RAILWAY COMPANY.

Practice—Proceedings in Chambers—Application for Payment out of Court—Lands Clauses Consolidation Act, 1845—*Deposit in Court—Fund not exceeding* £1000—*Petition or Summons—Rules of Supreme Court*, 1883, *Order* LV., *r.* 2, *sub-ss.* 2–7—*Railway Company—Payment out to Third Person—Company's Seal.*

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The general expressions of sub-sect. 2 of Order LV., rule 2 (Rules of Court, 1883), are not to be construed as in any way qualified or modified by the subsequent sub-sections. Therefore, an application by a landowner and a railway company for payment out of a sum not exceeding £1000 deposited in Court under sect. 85 of the *Lands Clauses Consolidation Act*, 1845, should be made by summons in Chambers and not by petition.

Any such summons asking for payment out to a person on behalf of the company, should be sealed with the company's seal, by analogy to the practice on petition.

IN the case of the *Maidstone and Ashford Railway Company*, the company had deposited £600 in Court under sect. 85 of the *Lands Clauses Consolidation Act*, 1845.

The purchase from the landowner having subsequently been completed, and a conveyance duly executed, the landowner and the company applied by a petition, presented since the Rules of Court, 1883, came into operation, for payment out of the £600 to the company's solicitor.

In the case of the *Bala and Festiniog Railway Company*, the landowner and the company applied under similar circumstances for payment out of £801 17*s.* to the company's secretary, the

application being by a summons in Chambers, purporting to be in pursuance of Order LV., rule 2, of the new Rules of Court. Upon the summons coming before his Lordship in Chambers he ordered it to be adjourned into Court for argument, as there appeared to be some conflict of judicial opinion upon the question whether, having regard to the new Rules of Court, such applications, where the fund in Court does not exceed £1000, should now be made by summons, or by petition as formerly.

The petition and the summons happened both to be in the paper for hearing on the same day, and the question was first raised by counsel appearing on the petition. His Lordship, however, deferred delivering judgment on the point until he had heard counsel in support of the summons.

W. Leigh Pemberton, for the petition:—

I submit that in applications of this kind the proper course of proceeding is by petition, as formerly. No doubt sub-s. 2 of Order LV., rule 2, is, standing by itself, sufficiently general to include such applications; but I submit that the general terms of that sub-section are cut down by the subsequent sub-sections, and that sub-sect. 2 has reference only to applications in any matter other than the matters which are specifically and separately dealt with by the following sub-sections. Taking, in particular, sub-sect. 7, which deals with "applications for interim and permanent investment, and for payment of dividends under the *Lands Clauses Consolidation Act*, 1845," if it had been intended that applications for payment out should also be included, the sub-section would surely have said so in terms, as the previous sub-section has done with regard to applications under the *Parliamentary Deposits Act*. The fair inference is that the only applications to be made in Chambers under the *Lands Clauses Act* are those specifically mentioned in sub-sect. 7. If sub-sect. 2 is to have the wide interpretation suggested, several of the other sub-sections appear to be superfluous in their terms. In *In re Calton's Will* (1) Mr. Justice *Pearson* seems to have expressed his opinion that the proper course of proceeding is still by petition and not by summons.

(1) *Post*, p. 240.

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Medd, for the summons:—

I rely on the plain literal meaning of sub-s. 2, which says that "applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter," shall be made in Chambers. The mere fact that the other sub-sections include matters falling within the 2nd sub-section is no ground for cutting down the plain general terms of that sub-section.

CHITTY, J.:—

The summons in the case of the *Bala and Festiniog Railway Company* was for payment out of Court of a sum of £801 17*s.* which was paid in under the provisions of the *Lands Clauses Act;* and the question raised was whether it was competent, under the new Rules, to proceed by summons to obtain payment out of a sum not exceeding £1000, where it had been paid in under the *Lands Clauses Act.* Hearing that there had been some decision arrived at contrary to the view I took at Chambers, I directed the matter to be adjourned into Court and argued there.

The question turns principally on the 2nd sub-section of the 2nd rule of Order LV. The language of that sub-section is this: "Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where the cash does not exceed £1000, or the securities do not exceed £1000 nominal value." Now the language of that sub-section is general; it is plain and unambiguous; and if it stood alone there is no question that it would apply to an application to obtain payment out of a sum not exceeding £1000 standing to the credit of a matter, notwithstanding that the money was paid in under the *Lands Clauses Act.*

But it is said that there is to be found in the context supplied by some of the following sub-sections a sufficient ground for cutting down the generality of these expressions, and the mode in which it is proposed to read that 2nd sub-section is as if the words stood thus: "any cause or matter other than those matters which are specifically dealt with in the following sub-sects. 4, 5, 6 and 7;" the argument or suggestion being that each one of those sub-sections deals with its own subject-matter exhaustively.

Now the 4th sub-section is in these words: "Applications

under 36 Geo. 3, c. 52, s. 32 (the *Legacy Duty Act*), in all cases where the money or securities in Court do not exceed £1000 or £1000 nominal value." It is to be observed that this sub-section does not in terms relate to payments out merely. The language, of course, is wide enough to include payment out, for the sub-section directs that all applications under the *Legacy Duty Act*, where the fund does not exceed £1000, shall be made in Chambers. It is quite true that the principal applications made under the *Legacy Duty Act* are for payment out, but still there are some applications relating to a fund paid in under that Act which are not strictly payment out. Under the 32nd section of 36 Geo. 3, c. 52, where a legacy has been paid into Court under that Act, the Court may, on petition or motion, in a summary way, not only make an order for transfer or payment out to the person or persons entitled thereto, but also apply the same for his or their benefit: and then there is added a proviso that, where the money has been improperly paid in, it shall be lawful for the Court, upon petition in a summary way, to dispose thereof in such manner as justice shall require. That is a proviso on which the Court has not often had to act, but on which, by a curious coincidence, I had to act on the last petition day.

On the proviso, as a general rule, the result of an application under it would be payment out, though the proviso does not refer to a payment out in terms; and it seems to me the Rule Committee have purposely used in the 4th sub-section, with regard to the *Legacy Duty Act*, terms wide enough to include any application of that kind, whether for payment out or not.

The observations I have made in regard to the *Legacy Duty Act* apply in full force to the next sub-section, the 5th, which deals with applications under the *Trustee Relief Acts* in all cases where the fund does not exceed £1000; for the jurisdiction conferred on the Court by the *Trustee Relief Act* (10 & 11 Vict. c. 96), comprises, under the 2nd section, not merely the power to make orders for payment out or transfer out, but also powers to make orders for investment, and for the administration of the trusts—its powers thus extending far beyond mere payment out or transfer. For this reason it appears to me the Rule Committee

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have so worded the 5th sub-section as to make it deal with all applications, whether for payment out, or transfer, or otherwise.

Then the 6th sub-section relates to the *Parliamentary Deposits Act*, and is in these words: "Applications under 9 & 10 Vict. c. 20 (the *Parliamentary Deposits Act*) for investment, payment of dividends, and payment out of Court."

It is asked, why, since payment out of Court under that Act is specially provided for by that sub-section, should sub-sect. 2 be read as including applications for payment out generally? The answer is obvious. The jurisdiction now conferred by sub-sect. 6 upon the Judge in Chambers to order payment out of the fund standing to the credit of the matter under the *Parliamentary Deposits Act* is not confined to sums of £1000, but is unlimited; and it was necessary, if such was the intention of the Rule Committee, that it should be expressed, as it is expressed, in terms.

Then I come to the 7th sub-section, which deals with the *Lands Clauses Act*, and that relates to "applications for interim and permanent investment and payment of dividends." There it stops; and from that I am asked to infer that it was not intended that applications for payment out should be made in Chambers. I answer, certainly it was not intended that they should be so made under the 7th sub-section; but I see nothing in that sub-section which entitles me to say that the general expressions contained in the 2nd sub-section are cut down. I hold that those general expressions are not qualified or modified in any way by the 7th or any other of the sub-sections.

There is no distinction to be drawn between the nature of an application for payment out under the *Lands Clauses Act* and of a similar application under any other of the Acts specially mentioned. Under the *Lands Clauses Act*, where a person becomes absolutely entitled to the money paid in and applies for payment out, his title to the money depends on his title to the land; and therefore, in such a case as that, an investigation, more or less complicated, may be necessary with regard to the title to the land. But in other cases also where there are sums standing to the credit of a matter, not being sums paid in under the *Lands*

Clauses Act, the title to the money frequently depends on the title to certain land which has been sold, or it may depend on other matters which, as under the *Lands Clauses Act*, may be attended with considerable complication. There is no distinction therefore that I can see in principle between the two cases.

It appears to me that I ought to apply the general rule of construction to the 2nd sub-section, namely, that unambiguous words are to be taken in their real import, and are not to be cut down unless the Court is satisfied from the context that they should be qualified. I hold, therefore, that this summons was right, and that an order must be made upon it.

I should say that since the point first came before me I have mentioned it to Mr. Justice *Pearson*, who is reported to have taken a different view to mine; but I have learnt from him that what occurred in Court was this: he was told that Mr. Justice *Kay* had arrived at a decision adverse to the opinion I have expressed; but afterwards, later in the day, he was informed that that was not so, and then without much discussion he thought the petition was necessary. I am not in a position to say at the present moment whether Mr. Justice *Pearson's* view agrees with the opinion I have formed, but he has ordered the question to be re-argued in his Court; and if in the case before him he had given his decision after having had the benefit of a discussion such as I have now had, I should probably—although I should not have been bound to do so—have considered it my duty to follow that decision, because the point is one upon which there should be no difference of opinion, if it can be avoided, among the Judges of the Chancery Division.

I may add that I also saw Mr. Justice *Kay*, and was informed by him that he had not given such a decision as was supposed; I may say I understand that his opinion coincides with mine.

Medd pointed out that the summons asked for payment out to the secretary of the company, and suggested that the summons should be sealed with the company's seal, by analogy to the former practice on petitions.

CHITTY, J. The summons should be sealed with the company's seal.

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With regard to the petition in the case of the *Maidstone and Ashford Railway Company*, as there has been some doubt as to what is the practice under the new rules, I make the order on the petition, and allow the costs in the usual way.

Solicitors: *White; Nelson.*

G. L. F. C.

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Nov. 7, 8.

[1875 M. 92.]

Administration of Estate—Trustees, Debtors to Estate—Bankruptcy of Trustee —Costs—Set-off—Bankruptcy Act, 1869.

Crombie and *Storer* were two trustees of an estate administered by the Court. *Crombie* became bankrupt after 1869. A balance of £896 was found due from *Crombie* to the estate, and a balance of £745 was found due from the estate to the two trustees jointly :—

Held, that the debt due from the estate to the two trustees could not be set off against the debt due from one; that the Plaintiffs were entitled to an inquiry what part of the £745 found due to the two trustees was, as between the two, due to *Crombie* the bankrupt, but as that inquiry was not asked for, and as there was evidence shewing that all the money was in fact due to *Storer*, the debt so due must be paid to him.

Costs.—The insolvent trustee being indebted to the estate and the solvent trustee not being responsible for that debt; and the *Bankruptcy Act*, 1869, having made a debt arising from a breach of trust to continue notwithstanding the bankruptcy :—

Held, that a reference be directed to the Taxing-Master to apportion the costs of the trustees appearing by the same solicitor, and that the costs of the solvent trustee be paid out of the estate and the costs apportioned as the costs of the insolvent trustee be set off against the amount found due from him to the estate.

Whether under this direction the whole of the common costs of the two trustees would be allowed to the solvent trustee or divided, must depend on the settled practice of the Taxing-Master's office.

THIS was an administration suit commenced in 1870, and the case now came on upon further directions for the purpose of settling the claims of the different parties and the amount of costs due to the several trustees.

There were two estates being administered: that of *James McEwan*, who died in 1868, and that of his widow *Margaret McEwan*, who died in 1870. *James McEwan* by his will appointed *John Connell*, *W. Aitkin*, and *J. M. Grant*, and his wife *Margaret McEwan* trustees and executors of his will, which was proved by his widow alone, the other trustees, who were resident in *Australia*, where the testator possessed considerable property, having renounced probate by a deed-poll dated the 2nd of December, 1868.

Margaret McEwan, who died in 1870, by her will appointed the

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Defendants, *David Crombie* and *David Storer*, executors of her will, which was proved by *David Crombie* in March, 1870, and by *David Storer* in October, 1872.

On the 21st of October, 1872, *J. M. Grant* and *W. Aitkin* were, under a power for that purpose given by the will of *J. McEwan*, appointed by *D. Crombie* and *D. Storer* to be trustees of the will jointly with them for the purpose of getting in and realising the testator's Australian estates, and *J. M. Grant* and *W. Aitkin* were made parties to these proceedings by a supplemental suit of *Porter* v. *Grant*, which was instituted in November, 1877.

Crombie had since been adjudicated a bankrupt.

The accounts of both estates had been prepared by professional accountants, and though the accounts of the various accounting parties were kept distinct, all the balances were brought into one general account, the result being that there was a balance of £1659 found due from *Crombie* and *Storer*, which was directed to be paid into Court by an order dated the 17th of November, 1876. Of this amount £1000 was paid into Court before the bankruptcy of *Crombie*, and of this £1000 *Crombie* had paid £200 and *Storer* £800, and *Storer* had also paid £310 to the accountants for their charge, £250 of which had been allowed by the Chief Clerk. The Chief Clerk by his certificate had given the aggregate of receipts and payments, first, during Mrs. *McEwan's* lifetime; secondly, during the time *Crombie* was the only executor; thirdly, since *Storer* proved the will. The result being that £896 was due to the estate from *Crombie*, and that £745 was due from the estate to *Crombie* and *Storer*. It was submitted on behalf of *Storer* that as he had paid about £1100 out of his own private moneys he was now entitled to be recouped the £745 due from the estate on the joint account.

An application was also made on behalf of the trustees that the proportion of the costs which would be due to *Crombie* should be set off against the balance due from him. The costs down to March, 1880, when an order was made on petition, had been taxed and paid. Since that time Messrs. *Farrer & Co.* had acted for the Defendants *Crombie*, *Storer*, *Grant*, and *Aitken*; it was therefore presumed that *Crombie's* share of the costs would be one-fourth of those incurred since the date of the order.

Glasse, Q.C., and *Levett*, for the Plaintiffs, who were persons entitled to interests in the estate :—

We submit that the balance found due from the estate to *Crombie* and *Storer* must be set off against the debt due from *Crombie*. We also submit that the costs incurred by the insolvent trustee under the joint retainer must be set off against the debt due from him and the costs of the solvent trustee only must be paid out of the estate. They referred to *Smith* v. *Dale* (1); *Lewis* v. *Trask* (2); *Clare* v. *Clare* (3); and *Hannay* v. *Basham* (4).

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the four trustees :—

This is a case of joint retainer, and the trustees ought to have the whole of the costs incurred out of the estate. The solvent executor is equally liable with the insolvent executor to the solicitors, and it would not be just that the solvent executor should have to pay his co-executor's costs merely because they appeared by the same solicitor. If they had appeared by different solicitors more costs would have been incurred: *Watson* v. *Row* (5); *Harmer* v. *Harris* (6); *Re Colquhoun* (7).

Nov. 8. NORTH, J.:—

Two points were raised in this case yesterday, and in the remarks I am going to make, although there are four trustees, at any rate as to part of the trusts, I will for convenience deal with the case as if there were two only.

The first point raised was this: a balance of £896 was found due from *Crombie*, who is a bankrupt and cannot pay. A balance of £745 was found due to *Crombie* and *Storer*; and I am asked to direct that the sum due to the two shall be deducted from and set off against the sum due from the one. That of course I cannot do. I cannot set off a debt due to two persons against a debt due from one of them. But there is something that I think I

(1) 18 Ch. D. 516.
(2) 21 Ch. D. 862.
(3) Ibid. 865.
(4) 23 Ch. D. 195.
(5) Law Rep. 18 Eq. 680.
(6) 1 Russ. 155.
(7) 1 Sm. & Giff. (App.) 1; 5 D. M. & G. 35.

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ought to do. This £745 is found due to the two; in other words it represents the amount by which the sums they have advanced to and paid for the estate exceed the sums which they have received. Now it is extremely improbable that these advances should have been made by them out of moneys to which they are entitled on joint account, and therefore the £745 must as between the two be payable wholly to one, or partly to one and partly to the other; and I think the persons who are entitled to receive £896 due from *Crombie* are entitled to know whether any and what part of the £745 found due to the two is payable to *Crombie*, for the purpose of having that part set off against the sum of £896 found due from *Crombie* to them. That is not raised by the certificate, but it is a matter now open. It has been stated by the trustees in an affidavit, but in my opinion the trustees were not bound to go into this question at the trial, because they were entitled if they thought fit to say it shall not be disposed of now, but must be subject to inquiry. I hold, therefore, that as a matter of right the Plaintiffs are entitled to an inquiry whether any and what part of the £745 found due to the two is, as between the two, due to *Crombie*, and I shall direct that any sum found due to *Crombie* be set off against the sum found due from him. It is suggested by the Plaintiffs that such an inquiry would be a very troublesome and expensive one and not worth the expense. I do not quite follow that, because the amount in question is nearly £900, and I cannot imagine the costs of investigating this matter would amount to anything like that sum, and I should have felt some little difficulty in holding that the matter was not worth going into. But as the Plaintiffs do not ask for an inquiry, and evidence is forthcoming in this affidavit of *Storer* which satisfies me, I am content to act upon it. Therefore what I shall direct is, that the order shall contain a recital to the effect that as between *Crombie* and *Storer* the £745 is wholly due to *Storer*, and a direction that that sum be paid to him instead of being paid to the two.

Then there is a question about the costs. *Crombie*, as I have said, became a bankrupt, and the question is what is to be done with respect to the costs of the trustees, of whom one has become bankrupt and owes a debt to the estate which he cannot pay, and

the other is not responsible for that debt, and not only owes nothing to the estate, but has a considerable amount found actually due to him. With respect to the costs of a person who has become bankrupt the law has been somewhat changed by the Act of 1869 (32 & 33 Vict. c. 71). Before that time bankruptcy released a trustee from his debt, and therefore there was nothing left against which his costs could be taken away from him. That Act made debts arising from breaches of trust continue, notwithstanding bankruptcy, and therefore the question arises how the costs ought to be dealt with in this case. The point came before me in *Lewis* v. *Trask* (1), and I took the view that the trustee not being released from the debt could not have his costs out of the estate until he made good the debt he owed. Vice-Chancellor *Hall* a few days afterwards took a different view. The question subsequently came on for decision before Mr. Justice *Chitty* in *Hannay* v. *Basham* (2), and he decided in favour of the view which I had taken. That case has not, as far as I am aware, been carried to the Court of Appeal; and though it may be said to be only a question of costs, which could not be the subject of appeal, yet I think, inasmuch as two Judges had taken a different view upon the point, there would have been no difficulty in obtaining leave to take it to the Court of Appeal. Under those circumstances I adopt the decision of Mr. Justice *Chitty*, which is the latest. In *Smith* v. *Dale* (3) a direction was given that the costs of the bankrupt trustee should be paid in full, but I do not think that amounts to a decision upon the point. Apparently the question was not argued at all; and that makes it more likely that it did not arise. The late Master of the Rolls would hardly have omitted to notice it if it had arisen, and it seems to me very likely that the point may not have arisen in that case, because the testator died in 1875, the debt was an old one, and it might be a case of bankruptcy under the old law and not under the law originated by the Act of 1869.

Then there is the further question as to how the costs are to be shared. It seems likely that there is in this case a joint retainer under which a bill would be delivered, consisting probably of

(1) 21 Ch. D. 862. (2) 23 Ch. D. 195.
(3) 18 Ch. D. 516.

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separate costs of the solvent trustee and separate costs of the insolvent trustee, and what I may call common costs of the two. Now the point came before Vice-Chancellor *Hall* for decision in a very similar case—*Watson* v. *Row* (1)—and there he decided that the surviving executor was entitled to be paid out of the estate all the costs for which he was liable, and that the costs incurred by a deceased insolvent executor must be set off against the sum found due from him. He decided that the whole bill for which the solvent trustee was liable must be paid, the result being that he made the estate pay, not merely all the costs for which the trustee who was solvent was liable as trustee, namely, the common costs and any separate costs of his own, but he also made the estate pay any separate costs of the other trustee who was insolvent. The Master of the Rolls afterwards pointed out that that was too much, and I think so too, because the solvent trustee was only liable for the separate costs of the other trustee, not by reason of his being trustee, but by reason of his having contracted to bear them, or become surety for them, by the form of the retainer which was given in that case; and although he was a trustee, and assuming that a trustee should have all the common costs and all his own separate costs out of the estate, there is no reason why he should have out of the estate the costs which he was only liable for because he had contracted to pay to the solicitor the separate costs of the other trustee. Therefore that criticism of the Master of the Rolls upon Vice-Chancellor *Hall's* judgment is one that I entirely adopt and follow.

Then the question is further whether, in taxing the costs of the trustees, although one trustee owes a debt to the estate which he cannot pay, the estate should pay all the common costs as well as the separate costs of the solvent trustee? Now that was not decided by the Master of the Rolls in *Smith* v. *Dale* (2). What he says is, not that Vice-Chancellor *Hall* was wrong to that extent, but that it is a question which can only be decided by the Taxing Master, and he therefore left it to the Taxing Master to apportion the costs between the two, and say what were the solvent trustee's costs which were to be paid out of the estate, and what were the costs of the other trustee which were not to be paid out of the

(1) Law Rep. 18 Eq. 680. (2) 18 Ch. D. 516.

estate. Now, although I have spoken of what I have called the common costs and the separate costs of the trustee, I do not express any opinion whatever as to whether the whole of the trustee's costs can be allowed to the trustee or not. That is a question, as the Master of the Rolls said in *Smith* v. *Dale* (1), which it is for the Taxing Master to deal with; and there is all the more reason for leaving it to him, because a practice must prevail in the office with respect to it extending over a great many years. It has not existed only since the *Bankruptcy Act* of 1869, but long before. In every case in which there were two trustees, neither of whom was bankrupt, but one owed a debt to the estate which he could not pay, there the costs had to be apportioned. There must be a well-settled practice in the Taxing Master's office, and I shall not interfere with it. I therefore simply refer it to the Taxing Master to apportion the costs, and I direct that the costs of the solvent trustees shall be paid out of the estate, and that what he shall apportion as the costs of *Crombie*, the other trustee, shall be set off against the £896 found due from him. I have looked at the actual order in *Smith* v. *Dale*, but it does not carry the matter further than appears upon the face of the report.

Solicitors: *Farrer, Ouvry, & Co.; Mercer & Mercer; Ingle, Cooper, & Holmes.*

(1) 18 Ch. D. 516.

W. G.

NORTH, J.

1883

Nov. 16, 17, 19, 20.

GOODHART *v.* HYETT.

[1882 G. 3014.]

Easement—Conduit—Interference—Building—Previous Application—Costs.

The owners of a house had had for many years a supply of water by pipes passing through the adjoining land under circumstances which in the view of the Court created an easement. The owner of part of theadjoining land proceeded to build a house over part of the line of pipes:—

Held, that the owners of the house had a right to go on the adjoining land and repair the pipes when necessary, and that by building the house their means of access to the pipes would be materially interfered with and rendered more expensive; and an injunction was granted to restrain the building of the house.

The fact that an action has been brought without a previous application to the Defendant does not prevent the Plaintiff from getting his costs of the action.

THE Plaintiffs were the devisees in trust and the tenant for life of a house and grounds at *Tooting*, called the *Manor House*, which had been the property of *J. H. Goodhart* their testator. There was on land called the *Carrington* estate, at a distance of about 300 yards from the house of the Plaintiffs, a deep spring of water called the *Bottomless Pit*, from which water passed by pipes through the *Carrington* estate for the supply of the Plaintiffs' house and grounds. These pipes had been many years in existence, and had been recognised in many deeds made by the predecessors in title of the Plaintiffs and of the Defendant. The estate was in July, 1880, sold for building purposes, and the Defendant, *O. W. S. Hyett*, took a part of it, and was proceeding to build a house over the line of pipes. This action was brought to restrain the Defendant from so building, and also for damages in respect of water alleged to have been abstracted from the pipes.

The Defendant denied the right of the Plaintiffs, and also denied that the building of the house would injure the Plaintiffs or prevent them from examining or repairing the pipes.

Witnesses were produced on both sides. The facts of the case

and the conclusions drawn by the Court from the evidence are fully stated in the judgment.

W. W. Karslake, Q.C., and *S. Dickinson*, for the Plaintiffs.

Higgins, Q.C., and *W. M. Spence*, for the Defendant:—

The well was never material to the Plaintiffs, and the supply of water is not interfered with, so that the damage, if any, is too slight: *Cooper* v. *Crabtree* (1); *Pattisson* v. *Gilford* (2). The Defendant has not broken, and does not intend to injure the pipes. As to the Plaintiffs' complaint that their access to the pipes will be rendered troublesome, the Defendant is willing to build subject to that liability. There is no express grant, only a presumption, and it cannot be said that the Plaintiffs can prevent any one from building over the whole line of pipes. *Sandgate Local Board* v. *Leney* (3) was a much stronger case, and yet the Court would not interfere. If there is no encroachment no harm is done: *Earl of Cardigan* v. *Armitage* (4); *Gerrard* v. *Cooke* (5); *Gayford* v. *Moffatt* (6); *Clifford* v. *Hoare* (7). The mere fact of doing something which may under certain circumstances be

(1) 20 Ch. D. 589.
(2) Law Rep. 18 Eq. 259.
(3) 1883. Aug. 1. Denman, J.

SANDGATE LOCAL BOARD *v.* LENEY.

THIS was an action to compel the pulling down of a stable or shed which had been built over a sewer running through land owned by the Defendant, there being an agreement by a former owner of the land that he would not set up buildings so as to prevent reasonable access to the sewer.

Barber, Q.C. and *E. Ward*, for the Plaintiffs.

Higgins, Q.C., and *Wurtzburg*, for the Defendant.

DENMAN, J., said that the only question was whether the existing building was a substantial interference with the right of the board to get at the sewer. If there was he should certainly grant the injunction asked for. There had been exaggerated evidence on both sides, but in his Lordship's opinion the utmost proved on the part of the Plaintiffs was that it might take an hour or so longer to get down to the sewer. That was not sufficient ground for a mandatory injunction, and the action must be dismissed with costs.

Solicitors: *Talbot & Tasker*, for *A. D. Brockman, Folkestone; Sharpe, Parkers & Co.*, for *E. W. & V. Knocker, Dover*. C. M.

(4) 2 B. & C. 197.
(5) 2 B. & P. (N. R.) 109.
(6) Law Rep. 4 Ch. 133.
(7) Ibid. 9 C. P. 362.

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injurious will not justify the Court in interfering: *Wood* v. *Sutcliffe* (1).

W. W. Karslake, in reply:—

It is now said that there will be no interference, but the right to the easement is disputed. The mere continuance of an easement is a sufficient title, but this has been recognised: *Tipping* v. *Eckersley* (2). The Plaintiffs are bound to proceed at once, or else they will be told that they ought not to have lain by and allowed the building to go on. In such a case there is no need to prove actual damage: *Gale* on Easements (3); *Bower* v. *Hill* (4); *Harrop* v. *Hirst* (5); *Goodson* v. *Richardson* (6). Any house built over the pipes must be a serious impediment to access for repairs. The only thing decided in *Sandgate Local Board* v. *Leney* (7), referred to on the other side, was that the access would not be seriously interfered with.

NORTH, J.:—

This is a suit which I am sorry to have to deal with. The Defendant had the misfortune to become the lessee for building purposes of some small plots of land in a field or garden which formed part of a property across which a line of pipes had for many years lain from a certain spring to the property of the Plaintiffs. The Defendant has begun to build upon these small plots, and in doing so he has clearly, according to the evidence, begun his building over part of the line of pipes. One question in the action is whether he is justified in so doing or not. It also is suggested that he has tapped the pipes and taken water from them. That is the second question.

Now the history of the pipes seems very shortly to be this. As far back as 1757 we know that the pipes did exist, for the purpose of taking water from the spring called the *Bottomless Pit*, and ran across a piece of land to a reservoir, and to the site of an old canal, which is called the lake, in the rear of the Plaintiffs'

(1) 2 Sim. (N.S.) 163.
(2) 2 K. & J. 264.
(3) 5th Ed. pp. 340, 571.
(4) 1 Bing. N. C. 549.
(5) Law Rep. 4 Ex. 43.
(6) Ibid. 9 Ch. 221.
(7) *Ante*, p. 183, n.

house. The *Bottomless Pit* seems to be a spring of particularly good pure water, of wonderful depth, which for upwards of 100 years past has afforded a very large supply of what is stated by the witnesses to be "as beautiful water as you can wish to see." In 1757 the owner of the manor-house was also the owner of the *Bottomless Pit*, and of all the land between the two, and at that time there was existing a line of pipes across the intervening land to convey the water for the supply of the manor-house and the gardens and buildings in connection with it.

At that time there was no easement of any sort, because the property all belonged to one owner. In 1797 apparently the property first began to belong to separate owners, and it would appear from a deed of that date that the line of pipes ran in the nearest possible line from the reservoir to the back of the Plaintiffs' greenhouse, where the line of pipes passed under that greenhouse. They had been there, as we know, at that time for fifty years or so. There is nothing to shew what pipes they were at that time, but no doubt they were wooden pipes made of the trunks of trees hollowed out in the centre and roughly joined or connected at the ends. In 1860 an alteration was made, and at that time there is no doubt upon the evidence, and I am satisfied, that the line of pipes no longer ran in the direction shewn in that deed of 1797, but ran in what may be roughly called an easterly direction and then turned at a right angle and ran down to the back of the Plaintiffs' premises, and there is evidence that at that time the diameter of these pipes had been altered from two to six inches. [His Lordship then referred to the evidence which led him to this conclusion.]

Then in addition to that I have this, that in 1837 a deed was executed by which the *Rollinsons*, who were for forty years the owners of the nursery garden, on acquiring that property entered into a covenant with their vendor, who may have been under a similar covenant himself, recognising the right of *Goodhart's* premises to be supplied with water in this way, and agreeing that the right should continue as heretofore.

Now it seems to me that any alteration made in the line of the pipes at that time, or in the diameter of the line of pipes, is clearly immaterial. It was made with the concurrence of the *Rollinsons*,

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or their predecessors, the persons who were the owners of the land; and therefore I think it clear that the Plaintiffs have established the right at the commencement of this action to have those pipes recognised as their property lying in the line upon which they are found at the present time.

Then the question is how far the Defendant has done anything to interfere with that right. These pipes certainly are a conduit, and no doubt are the property of the Plaintiffs, and the right to have the pipes there as an easement upon the land, part of which the Defendant claims, carries with it the necessary right to enter on the land in order to do what is necessary to preserve the right as it exists. On this subject *Gale* quotes from *Bracton* this statement (1): "*Ad aquæ ductum pertinet purgatio sicut ad viam pertinet refectio.*" Of "*purgatio*," of course, the literal English is cleansing; that is, keeping it free from obstructions, whether the obstruction is caused by leaves or dirt, or deposit fallen into it, or anything which would obstruct the flow of water as it had previously flowed. Then there is another right in connection with this, and *Gale* says (2): "It would appear on the principles hereafter considered that where the enjoyment of the easement is had by means of an artificial work (*opus manufactum*) the owner of the dominant tenement is liable for any damage arising from its want of repair. Thus if a man carries water by means of conduit-pipes through his neighbour's land he must keep those pipes in repair"; and *Bell* v. *Twentyman* (3) is cited as an authority for that statement. It is quite clear that where a man has the right to cleanse a stream or to repair the banks for the purpose of keeping the stream going, he has the right to enter on the land for that purpose. If authority were wanted Lord *Coke* supplies it in *Liford's Case* (4), where I find this passage: "The law gives power to him who ought to repair a bridge to enter into the land, and to him who has a conduit in the land of another, to enter into the land to mend it when occasion requires it, as it is resolved in 9 Edward 4th, 35 a. So it is agreed in 2 R. 2 Bar. 237. If I grant you my trees in my wood you may come with carts over my land to carry the wood: *temp.* Ed. 1,

(1) 5th Ed. p. 528.
(2) Ibid. p. 529.
(3) 1 Q. B. 766.
(4) 11 Rep. 52 a.

Grants, 41. *Lex est cuiqunque aliquis quid concedit, concedere videtur, et id sine quo res ipsa esse non potuit;* and this is a maxim in law." The well-known case of *Pomfret* v. *Ricroft* (1) is to the same effect. This shews that the Plaintiffs having established the right to the line of pipes through the close in which the Defendant is interested are also entitled to enter upon the close from time to time for the purpose of doing what is necessary to cleanse the pipes, or, what is more important, to repair the pipes, because that is the greater matter, and the greater covers the less.

But the Defendant justifies building the house over the line of pipes upon the ground that it is not interfering with the legal right of the Plaintiffs to which I have just referred, and he says that the Plaintiffs will have the right to do it just as much as before, and therefore there is no reason why any injunction should be granted against him. But the fact that the Plaintiffs would continue to have the right to do it is not enough. They must have the opportunity and the means of doing it; and the question is whether anything which the Defendant is doing will practically and really in any way obstruct the doing of what the Plaintiffs are entitled to do if their position is such as I have said. Now, with respect to that, the Plaintiffs say that the pipes cannot be repaired under the house if the house is built. There is evidence for the Defendant which says they can be repaired very easily. These two statements are not altogether inconsistent, because the parties are not speaking quite to the same point. There is no doubt that people who can tunnel under the Alps or the English Channel, or who can remove a standing block of houses by engineering skill, can, if they please to set about it, carry out this work in such a way that the pipes under the house might be repaired notwithstanding the house stood over them. But the question is not whether it can be done as a matter of engineering skill, but whether practically the Plaintiffs will have the same opportunity of enjoying the right as before. In my opinion they will not, and my reason is this. I have before me the plan of what is in progress. It is an incomplete plan, but it shews that the Defendant is building two houses which on that plan are marked A and B. The property to a certain extent has

(1) 1 Wms. Saund. 322 b.

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been laid out. It proves that roads have been made, and it shews two houses, A and B, which it is admitted the Defendant is building. He is also building two adjoining houses to the left of the house marked A. Therefore the house marked A, under which the line of pipes goes, is not even an outside house but one of the centre houses of a row of four, and in fact the line of pipes goes as nearly as possible through the centre line of the four houses. These houses front to a road, and then at the other side there is a yard, but no road, as the plan shews. It is suggested by the witnesses for the Defendant that the pipes under the house A can easily be repaired by sinking a shaft either in front of or behind these houses, or both if necessary, according to the point in the house where the repairs are required, and tunnelling or driving a heading, as in mining, or opening a trench under the joists for the purpose of getting at it. But, in the first place, I do not know exactly how they are to find where the pipe is broken. If the pipes were simply stopped up I could understand it, but if a pipe is broken, or if it has settled a little so that the joints are displaced, I do not see how they could find out that by putting a rod or rods into it. Then, in the next place, supposing the Plaintiffs were to want to exercise this right to repair the pipe or the joints, what are they to do? They cannot get access to the back of the house unless through the house itself, and cannot do anything in the front of the house unless it is done either in the street or on the little piece of land left between the bow-window and the street. If they went there after some time and asked a tenant to be allowed to go in and make these repairs there might be great difficulty in getting leave to do it at once. The tenant might say he would not allow it. If they tried to do it from the street and made application to the local board or authority, who in all probability would have control over this road, they would ask what the right was, and whether anything of the sort had been done before, and the Plaintiffs would have to say there had not. So that there might be great difficulty in getting leave to act on either of the two alternatives which the Defendant's witnesses say might so easily be adopted. Even if the tenant did say, "You may do it but it is a great inconvenience," what would have to be done would be to open the whole line

from the street till they found the place where the defect existed. For that they must take up the floor of the house or tunnel from the front in the way I have mentioned, and make an opening by cutting out one or more joists as might be necessary till they come to the defect.

Further than that, suppose all this were done, it is obvious even by the Defendant's account that the expense of it would be three times as much as it would be if the premises were left as they are. Under these circumstances it seems to me that this is not a case in which it can be said that the Plaintiffs will have the same opportunity of repair hereafter as they have had hitherto.

But then it is suggested that if the pipes were once well laid they will last and will not want repair. I do not know anything that will last so long as is suggested. They are said to be good pipes, certain to last some time. I have had the witness who laid them before me, and there was not any suggestion that the job was not done as well as could be at the time. But after the Plaintiffs' case was over some of the Defendant's witnesses said that where the ground happens to have been opened the pipes shew that at the joints they let the water out, and there is a suggestion that they have not been properly laid or stopped. I cannot hear it suggested that they have not been properly laid, for the reason I have mentioned; but if I believe the evidence that the pipes are leaking, it shews that after a lapse of twenty-three years the state of things is this: that there is an escape of water, and some repair is necessary. I cannot, therefore, accept the suggestion that they never will want repair; and therefore putting on one side all question as to whether the house will be likely to settle down so as to break the pipes, it seems to me that the Plaintiffs will not have the same opportunity that they had before, and will not have reasonable means of access for the purpose of doing such repairs as must necessarily be wanted, and therefore that the Defendant is doing something which interferes with the right of the Plaintiffs.

As regards the two cases which were cited by Mr. *Karslake*, *Bower* v. *Hill* (1) and the later case of *Harrop* v. *Hirst* (2), it does seem to me, looking at the rule laid down there, that they are

(1) 1 Bing. N. C. 549.

(2) Law Rep. 4 Ex. 43.

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not without application here; because (and that is further a ground for saying that the Defendant is wrong) it appears to me that if the Plaintiffs were to allow the Defendant to build the houses without remonstrance, and they remained for fifty years without anything requiring to be done to the pipes, I know nothing to prevent the Defendant afterwards building a different house of a totally different character, and if that were done and a question were then raised as to his liberty to interfere with these pipes, it might be said, that they could not possibly prevent the Defendant building a much heavier structure over them, because the fact that they allowed one building without remonstrance was a strong piece of evidence against them on the question whether larger houses might not be built.

It appears to me that this is a case in which I am bound to interfere by granting an injunction, because there is not only a mere possibility that harm may come, but the necessary effect of what is being now done is that when the pipes have to be repaired there will be a greater difficulty and greater expense in doing it than at the present time. The Master of the Rolls in *Pattisson* v. *Gilford* (1) called attention to that point; and although in the earlier part of his judgment he uses the word "possibility," and also "inevitable;" he explains afterwards (2), that when he used those phrases he did not use them in the sense of there being no possibility the other way; "because," he says, "I think Courts of justice must always act upon the theory of very great probability being sufficient—all I mean is that there must be such a great probability, that, in the view of ordinary men, using ordinary sense, the injury would follow."

It seems to me that a time will arrive at which the existence of this house upon the Defendant's property will materially affect the right of the Plaintiffs, and that therefore under these circumstances they are entitled to an injunction.

Mr. *Higgins* said that the result of that might be that it would prevent all building upon this land. I do not see that; but, even if it were the result, and that were the necessary effect of the grant formerly made, which I find the facts shew, it would in my opinion have to be borne by the party who was the owner

(1) Law Rep. 18 Eq. 259. (2) Law Rep. 18 Eq. 264.

for the time being of the servient tenement. I find there was a case (I do not cite it as precisely in point, but as affording an analogy which is not without its use) of *Whitehead* v. *Parks* (1). There the facts were, to put them shortly, that the landowner by a deed demised to *Whitehead* a dwelling-house and fifteen closes of land, and granted all streams of water which might be found in four of them, which were mentioned, excepting out of the demise the mines and minerals, and all streams of water, and the right to enter and take the minerals. The defendants afterwards, being then the owners of the minerals, entered on the property and proceeded to work the minerals, and it was held that they could not even under that right work the minerals in such a way as to cut off the springs in the closes in question. It might have been said there that the minerals were very valuable property, and that it never could have been the intention to deprive the owner of the minerals of the power of working them. Still, in that case, it was held that the power to work the minerals could not be exercised so long as the easement existed. So, in the present case, I think if the result of what has been done were to prevent the Defendant from building he would have to bear the burden. But I do not think that is the result in this case, and therefore it is unnecessary to go the whole length for which that case seems an authority.

Then it is said further that a similar point was decided by Mr. Justice *Denman* in the case referred to, *Sandgate Local Board* v. *Leney* (2). But it does not seem to me that that case is any assistance to me in this matter, because there was in that case a grant of a right of building, provided always that it did not interfere with access to a sewer. Here it is clear that there might be some building over this land which would not interfere in any way with the Plaintiffs' right. The Defendant might build over it by throwing an arch of such a size as would not interfere with this right; and then the application of that case to the present, the principle being admitted, depends upon how far the facts of one case resemble those in the other. The fact that in that case Mr. Justice *Denman* decided that the shed could be built without interfering with the right does not assist me in

(1) 2 H. & N. 870. (2) *Ante*, p. 183, n.

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coming to the conclusion whether this house can be built without interfering with the right which I have to deal with here.

Then it is said that the state of the water now is very nasty. If true, I cannot understand what that has to do with it. The Plaintiffs are entitled to have the water come to their premises, and it is proved that the water at its source is very good. It is also suggested that they have another supply, namely, the pump in the pantry; but it is idle to suggest that the pump in the pantry will supply the outbuildings, the stables, and conservatories, which cover a good many acres. Even if it did, I know no reason why the Plaintiffs who have had for 100 years a right of water to their premises are to give that right up because they can get water from somewhere else.

The correspondence does not throw any light on the matter, and I pass that by.

There is another part of the case which I must mention. It is that part which seeks to charge the Defendant with having done what in my opinion would have been a dishonest act, namely, secretly tapped these pipes. There is an allegation to that effect in the statement of claim. For reasons I have mentioned as the case went on I have come to the conclusion, believing the evidence of the Defendant and of the labourer whom he employed, that they never did anything of the sort, though no doubt the Plaintiffs believed they had done so.

Under those circumstances, so far as the action seeks relief on that head, I shall dismiss it. As to the other part, I think the Plaintiffs are entitled to the injunction.

The only other point is with respect to the costs. I am very sorry to find an action of this kind commenced without any communication to the Defendant, but there is no rule that a plaintiff must first apply to the defendant before bringing his action. In fact there are many cases where it would be impossible, because the application might defeat the object of the action. In this case, an application to the Defendant could not have defeated the Plaintiffs' object. They might have asked the Defendant to desist, and could not have been injured by the Defendant's refusal, whereas all parties might have been benefited by coming to an arrangement. And what is more, if

such a proposal had been made by the Plaintiffs to the Defendant, it seems to me very probable that the suit would have been avoided altogether.

Under these circumstances I have felt very much disposed, if I could, to say that there ought to be no costs of the action. I do not think I can do that; but I think it is a case in which, there being a right set up by the Plaintiffs and denied by the Defendant, the Plaintiffs must have the costs of the action, so far as relates to the house in course of erection by the Defendant; but so far as the action relates to the alleged tapping of the pipes, the action will be dismissed with costs.

Solicitors for Plaintiffs: *Wilkinson & Drew.*
Solicitor for Defendant: *F. Howse.*

C. M.

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Nov. 16, 17.

In re RALPH'S TRADE-MARK.
RALPH *v.* TAYLOR.

Trade-marks Act, 1875 (38 & 39 *Vict. c.* 91), *rule* 33—*Application by Person aggrieved—Proprietor of Trade-mark not carrying on Business.*

The owner of a patent for a washing machine called "The Home-washer," which had been exclusively manufactured by a licensee upon payment of a royalty, registered "The Home-washer" as his trade-mark, a year before the expiration of the patent, and claimed the exclusive use of that name. The patentee had not carried on any trade connected with the manufacture of these machines for a year and nine months after the patent had expired. The licensee moved under the 33rd of the rules framed under the *Trade-marks Act* to have the trade-mark expunged from the register:—

Held, that the licensee, who had been the sole manufacturer of the machines, was a person aggrieved within the terms of the 33rd rule, and that the patentee, not having been engaged in any business concerning the goods within the same class for more than one year, was not entitled to retain his trade-mark.

Semble, that the name of a patented article which has become known in the trade is not a fitting trade-mark after the expiration of the patent, since it would have the effect of extending the patent beyond its legal limit.

THIS was a motion on behalf of Messrs. *Taylor & Wilson*, machine manufacturers, for an order to remove the trade-mark "The Home-washer," from the register of trade-marks. In February, 1868, the Plaintiff, *Frederick William Ralph*, became the purchaser of a patent for a certain washing-machine called "The Home-washer," which was taken out in the year 1868, and expired in February, 1882. The Plaintiff *Ralph* never manufactured the machines himself, but gave a license in the first instance to *Carrick & Sons*, manufacturers of *Edinburgh*, who made the machines under the license, paying a royalty for the same up, to the year 1877, and on the 15th of May in that year *Ralph* gave an exclusive license to *Taylor & Wilson* to manufacture the machines, they paying a royalty of 6*s.* 8*d.* upon each machine.

On the 22nd of December, 1876, the Plaintiff registered the trade-mark of "The Home-washer" as applied to these machines. The patent expired on the 20th of February, 1882, since which

time Mr. *Ralph* had been confined to his house by a serious illness, and had not himself, or by any agent, manufactured a single machine.

There was also a motion on behalf of the Respondent *Ralph* for an injunction to restrain *Taylor & Wilson* from infringing the trade-mark.

Higgins, Q.C., and *E. S. Ford*, for *Taylor & Wilson*:—

Our first contention is that this trade-mark ought never to have been registered at all from the nature of it, and in support of this contention there is the case of *In re J. B. Palmer's Trade-mark* (1), and we also say that *Ralph* not being a trader himself, and not being in business, cannot claim this trade-mark in gross, and we have a right to have it removed from the register under the 33rd of the revised rules, previously the 34th rule under the *Trade-marks Act* of 1875, 38 & 39 Vict. c. 91: *Sebastian* on Trade-Marks (2). No single machine has ever been manufactured by *Ralph* himself, and he has not been in any business connected with the trade, and we have been the exclusive licensees ever since the 15th of May, 1877. Every argument used in *In re Palmer* is applicable here. It was there held that the words "Braided Fixed Stars" could not be registered as a trade-mark because they were merely descriptive of a known class of goods which were patented, and it would be absurd to say that a man could continue the monopoly given him by the patent after the expiration of the patent, and no patentee had a right to take a description of a patented article and to register that as a trade-mark, and then, when the patent has expired, to say no one shall use that name because the use of it is protected by making it a trade-mark. We say here that "The Home-washer" is a mere description of the patented article, and after the expiration of the patent every one is entitled to make it; so in *Linoleum Manufacturing Company* v. *Nairn* (3), Mr. Justice *Fry* said linoleum was the name of the article made in pursuance of a patent, and it was absurd that a thing which had become known as linoleum, and was protected by a patent as long as the patent lasted,

(1) 21 Ch. D. 47; 24 Ch. D. 504. (2) Page 233.
(3) 7 Ch. D. 834.

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should still be protected after the patent had expired, and that persons already entitled to make linoleum should not be able to call it what it was known as by the trade. *Taylor & Wilson* had made about 20,000 machines under their exclusive license, and had paid a royalty upon each. They had also brought out improvements in the machine, which they had patented, but still the machine was known as "The Home-washer," and described as such in the trade; so it is a description of the patented article. The patentee was not engaged himself in any business concerning the goods. The patent was in fact handed over to an exclusive licensee for the whole term of the patent, but it cannot be said that he was engaged in the business himself. Section 2 of the *Trade-marks Act* throws light upon the meaning of the word "business" when it is enacted that the trade-mark shall be transmitted only in connection with the goodwill of the business concerned in the particular goods, and shall be determinable with such goodwill.

J. Cutler, for *Ralph*:—

If this motion is brought under rule 33, it must be first shewn that the person making the application is a person aggrieved. If the applicants had any ground for objecting to the registration they should have complained at the time of the registration; but they have delayed for seven years, and are therefore guilty of *laches* in this respect. Then they say that Mr. *Ralph* has not been engaged in the business concerning the goods within the 33rd rule. But it is not necessary that a man should actually manufacture the goods himself, and if he employs an agent to make the machines that is sufficient. There is evidence that Mr. *Ralph* was in the habit of taking orders for the machines, and these orders he sent to *Taylor & Wilson*, directing them to forward the machines to the purchasers, and he then received the purchase-money himself. Since the patent expired there is evidence to shew that Mr. *Ralph* has been dangerously ill and has been incapacitated from giving any attention to business matters, and this went on down to the early part of the present year. He is now only able to attend occasionally to business, but he has been in negotiation with another manufacturer to make washing-

machines according to the principles of the patent and to sell them under the trade-mark, and such negotiations are still pending. It surely cannot be contended that where a man is so ill as to be unable to carry on business for a period of a year and nine months his business is to be considered as come to an end; and as regards *laches*, there is the judgment in the case of *In re Hyde's Trade-mark* (1), where the Master of the Rolls said that persons who register under the *Trade-marks Act*, and whose title is not impeached within five years, acquire an absolute title to a trade-mark to which they may not have been previously entitled at all. Then it is said that the trade-mark is one that every person may use, because it is a descriptive term, but this is not so, for the evidence of the applicants themselves is that owing to the improvements they have introduced the machine is different from that which was patented, and the term "Home-washer" means now a different thing from the Home-washer of 1876, and that no one can make the Home-washer without infringing their patents, two of which are still subsisting.

Higgins, in reply.

PEARSON, J.:—

This is an application to remove from the register a trade-mark which was registered in the year 1876 by Mr. *Ralph* as the trade-mark of a washing machine, the registered trade-mark being "The Home-washer," those words and nothing else—no sign—no letter, no figure of any kind attached to it. It appears that Mr. *Ralph* bought a patent which was taken out in 1868 for this machine, that he did not register his trade-mark till 1876, and that the patent expired in February, 1882. During the time when the patent belonged to Mr. *Ralph* he did not manufacture a single machine for himself, but Messrs. *Taylor & Wilson* had, certainly for a greater portion of the time, the exclusive license for making these machines under the patent which Mr. *Ralph* had acquired.

Since February, 1882, Mr. *Ralph*, from illness and other causes, has not continued either by himself or by any other person the

(1) 7 Ch. D. 724.

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manufacture of these machines, nor is he concerned in goods within the same class in any way whatever. This application is made under the 33rd clause of the revised rules, which is in these words, "The Court may on the application of any person aggrieved remove any trade-mark from the register on the ground, after the expiration of five years from the date of the registry thereof, that the registered proprietor is not engaged in any business concerned in the goods, within the same class as the goods with respect to which a trade-mark is registered." It is said in the first place that the persons who are making this application are not persons who are aggrieved. At the same time that this application is made to me to order the trade-mark to be removed from the register there is a motion for an injunction against Messrs. *Taylor & Wilson* to restrain them from using this name of "Home-washer." They have been the exclusive makers since 1877. They have been making the machines ever since the patent expired, but it is said that they have not made that machine pure and simple, that they have made certain improvements in the machine, but, nevertheless, that the machine so sold by them is known as "The Home-washer" with or without the improvements they have added to it. I can hardly conceive any persons who could be described as aggrieved, if persons against whom an injunction is sought for the use of that which they say ought not to be on the register, are not persons aggrieved. It seems to me they come completely within the category, and that therefore they are persons who are entitled to make this application to the Court. The only other question is this—whether or not Mr. *Ralph* comes within the 33rd rule? It is said that Mr. *Ralph* does not come within it for this reason, that since February, 1882, he has been prevented by illness and other causes, but principally by illness, from doing that which he is minded to do, if he can carry into effect certain treaties that he is engaged in at the present moment either to manufacture by himself, or other persons, this machine; and really the only question I have to determine is whether one year and nine months is sufficient cesser on the part of Mr. *Ralph* to shew that he comes within the 33rd rule, and is not a person engaged in any business concerning the goods, within the same class as the goods, with respect to which this trade-mark is

registered. I am of opinion that one year and nine months is quite sufficient. If I had any doubt about it I am able by analogy to say that I should not be wrong in concluding that one year and nine months is sufficient, from the fact that under the *Companies Act* you may wind up a company if it has ceased to carry on business for a year. The Legislature in that has shewn by its enactment when a business is supposed to be carried on, and what amount of cesser shews that the business is not being carried on. For nearly double that period Mr. *Ralph* has not carried on this business by himself or any other person. I am of opinion, therefore, and I so decide, that this trade-mark must be removed from the register on the ground that Mr. *Ralph* is not engaged in any business concerning the goods within the same class.

Another objection was taken also to the trade-mark, which is this. The trade-mark, as I have already stated, is "The Home-washer," and it is said that "The Home-washer," no doubt, during the existence of the patent described the machine and was understood in the trade to describe the machine which was made under the patent, but that if Mr. *Ralph* is to continue that as his trade-mark after the patent has expired, it really gives him, under the *Trade-marks Act*, an addition to the period which is given him under the patent. That point was taken and considered by my predecessor, the present Lord Justice *Fry*, in the *Linoleum Case* (1). Lord Justice *Fry* there came to the conclusion that it was impossible for this Court so to construe the *Trade-marks Act* as to do away with what has been the law of the land from the time of King *James* downwards, namely that the patent comes to an end at the expiration of a period of fourteen years, unless it is renewed and a further grant given, as is done in some cases.

I am very much disposed to think that if I had to decide this case on that point I should decide that it comes within the *Linoleum Case*, and that the trade-mark ought to be removed on that ground also. But I think it is sufficient to remove this trade-mark on the ground that Mr. *Ralph* is not engaged in any business concerning this class of goods. That is quite sufficient, and

(1) 7 Ch. D. 834.

PEARSON, J. 1883 *In re* RALPH'S TRADE-MARK. RALPH *v.* TAYLOR.

I must, therefore, grant the application that is made to me to remove that trade-mark; and having done so, I need not say that the motion for an injunction fails. Messrs. *Taylor & Wilson* must have their costs of this application, and Mr. *Ralph* must pay the costs of his own motion.

Solicitors: *Bolton, Robbins, Busk & Co.; J. Tucker.*

T. W. G.

PEARSON, J. 1883 *Nov.* 20.

HILBERS *v.* PARKINSON.

[1882. H. 4792.]

Marriage Settlement—Agreement to settle after-acquired Property of Wife—Real and Personal Property of which Wife "should become seised or possessed of or entitled to"—Construction—Estate Tail in Possession

A marriage settlement contained an agreement and declaration by the parties that, if the wife then was, or if, during the coverture, she, or the husband in her right, should become seised or possessed of or entitled to any real or personal property (of a specified value) for any estate or interest whatsoever, in possession, reversion, remainder, or expectancy, then and in every such case, the husband and wife, and all necessary parties, should, as soon as circumstances would admit, convey, assign, and assure the said real and personal property to, or otherwise cause the same to be vested in, the trustees of the settlement, upon the trusts thereof.

Held, that an estate tail in possession to which the wife became entitled during the coverture was not bound by this agreement, and that she could not be compelled either to execute a disentailing deed, and to convey the estate in fee thus acquired by her to the trustees, or to execute a conveyance of the property to the trustees, so that they could by inrolling the deed acquire an estate in fee simple.

Held, that the agreement extended only to the wife's estate or interest in the property acquired by her, and that it was impossible that she could convey an estate tail to the trustees.

SPECIAL CASE stated by consent for the opinion of the Court, under Order XXXIV. of the Rules of Court, 1875.

By the settlement, dated the 13th of October, 1875, made in contemplation of the marriage of Mr. and Mrs. *Hilbers*, certain sums of money were assigned by Mrs. *Hilbers* (then Miss *Parkinson*) to trustees, upon the trusts therein declared. And it was thereby agreed and declared that if Miss *Parkinson* "now is, or

if during the said now intended coverture, she or the said *G. E. Hilbers* in her right at one and the same time shall under the hereinbefore recited indenture of settlement, dated the 9th of October, 1867, or under the will of the said *J. P. Parkinson*" (the father of Miss *Parkinson*) "become seised or possessed of or entitled to any real or personal property, of the value of £300 or upwards, for any estate or interest whatsoever, in possession, reversion, remainder, or expectancy (except jewels, trinkets, &c.) then and in every such case, the said *G. E. Hilbers* and *M. F. K. Parkinson* and all other necessary parties shall at the cost of the said trust estate, as soon as circumstances will admit, and to the satisfaction of the said trustee or trustees for the time being, convey, assign, and assure the said real or personal property to, or otherwise cause the same to be vested in, the said trustees or trustee," upon the trusts therein mentioned.

J. P. Parkinson died on the 7th of December, 1874, having by his will, dated the 29th of March, 1873, in exercise of a power of appointment vested in him under a settlement, appointed some real estate situate in *Lincolnshire* and a sum of £945 to trustees, in trust, as to the land, for his daughter Mrs. *Hilbers* (then Miss *Parkinson*) and the heirs of her body; and in default of, or on failure of her issue, in trust for his son *W. H. Parkinson*, his heirs and assigns; and as to the sum of £945, upon trust for Mrs. *Hilbers* for her sole and separate use, but, if she should die without leaving a husband or any issue her surviving, then in trust for *W. H. Parkinson*, his executors, administrators, and assigns absolutely.

This action was brought by Mrs. *Hilbers* against the trustees of her marriage settlement and her husband, to have the trusts of the settlement carried into execution.

The questions stated by the special case for the opinion of the Court were: (1.) Whether the Plaintiff was bound by the settlement to bar her estate tail in the *Lincolnshire* property, and to convey the same freed from her estate tail to the trustees of the settlement. (2.) In case she was not bound to bar her estate tail, whether in such case she was bound to convey the property for her estate tail therein, or otherwise, to the trustees. (3.) Whether before the death of the Plaintiff the trustees of

PEARSON, J. 1883 HILBERS v. PARKINSON.

the settlement were entitled to have the sum of £945 vested in them on the trusts of the settlement, or whether the same sum did not remain subject to the trusts of the father's will until the Plaintiff's death, and whether, in the event of her death, leaving a husband or issue her surviving, the trustees would then be entitled to have the £945 vested in them on the trusts of the settlement. (4.) In what way the *Lincolnshire* property and the £945 were respectively affected by the settlement.

Cookson, Q.C., and *Langworthy*, for the Plaintiff:—

(1.) The estate tail is not bound by the covenant. An estate tail is equivalent to an estate for life in the first tenant, with a power of acquiring either a base fee or an estate in fee simple. A mere power is not bound by such a covenant: *Ewart* v. *Ewart* (1); nor is a life estate: *Marchioness of Townshend* v. *Earl of Harrowby* (2). A tenant in tail in remainder who has mortgaged his estate and entered into a covenant for further assurance, cannot afterwards, at the instance of the mortgagee, be compelled to execute a disentailing deed: *Davis* v. *Tollemache* (3).

[PEARSON, J., referred to *Fazakerly* v. *Ford* (4).]

The covenant is to convey property coming to the wife under her father's will; if it requires an additional act, such as the execution of a disentailing deed, to bring it within the covenant, then it is not property simply coming under the will, and therefore cannot be within the covenant.

[PEARSON, J.:—How could an estate tail by any possibility be conveyed? And I do not see how the Plaintiff could be compelled to convey a larger estate than that which she acquired under the will.]

How could specific performance be decreed of a contract to convey an estate tail? *Fry* on Specific Performance (5); *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), s. 47.

[PEARSON, J.:—The Court would not compel the doing of an act which would interfere with the rights of third parties. But

(1) 11 Hare, 276. 17 Jan 1022 (3) 2 Jur. (N.S.) 1181.
(2) 6 W. R. 413. (4) 4 Sim. 390.
(5) 2nd Ed. p. 435.

are there not cases in which it has been held that particular kinds of property, though hit by the words of a covenant of this kind, still could not have been within the contemplation of the parties?]

Yes; such cases as *Dering* v. *Kynaston* (1), in which it was held that such a covenant included only indefeasibly vested interests. (2.) As to the £945, it is not within the covenant, for the Plaintiff has not any indefeasible vested estate in it.

Freeman, for the trustees:—

I shall not contend that the £945 is bound by the covenant. As to the estate tail,—the cases cited are cases of limited interest and general power, and there is no doubt a vast difference between a power and an estate. In the present case the words in the covenant are "entitled to any real or personal property for any estate or interest whatsoever." It does not say that she is to assign the property for her own estate or interest in it. The question is whether the Plaintiff has an estate or interest in the property: *In re Jackson's Will* (2).

[PEARSON, J.:—There the estate was one which the wife could assign.]

The Plaintiff has covenanted to assign the property, not her interest in it. If she simply conveys the property to the trustees, and the deed is inrolled by them within six months, it will operate as a disentailing deed, there being no protector of the settlement, and thus the trustees will acquire the property for an estate in fee simple.

D. W. Marsden, for the husband.

PEARSON, J.:—

I am much obliged to counsel for the assistance which they have rendered me in this case, which is to a certain extent, as Mr. *Cookson* described it, a novelty. At the same time, I do not think there is so very much difficulty in it, when you come to thresh it out.

I conceive that all deeds are to be construed, not only strictly

(1) Law Rep. 6 Eq. 210. (2) 13 Ch. D. 189.

PEARSON, J. 1883 HILBERS v. PARKINSON.

according to their words, but, so far as is possible without infringing any rule of law, in such a way as to effectuate the intention of the parties.

[His Lordship read the covenant in the settlement and continued:—]

By the will of her father certain real estate has been devised to the wife and the heirs of her body, so as to give her an estate in tail *in præsenti* in possession. The question is whether that estate tail is bound by the terms of the covenant, and whether, therefore, she is now bound to convey the estate tail to the trustees by disentailing the property, or to convey the property to the trustees in such a way that, according to Mr. *Freeman's* suggestion, the trustees may inrol the deed and thus convert it into a disentailing deed.

Now, as I read the covenant—construing it strictly without any reference to the result of the construction—I understand it to mean this, that, if the wife is or shall become entitled to any real property for any estate or interest whatsoever in possession (I leave out the other words) she is bound, with her husband if necessary, to convey and assure that property to the trustees for such her estate and interest in possession. It cannot mean more than that. It cannot by any possibility mean that she binds herself to convey the property for an estate and interest which she does not possess.

The first question is whether she can be called upon to execute a disentailing deed? The trustees' counsel have very properly admitted that that question is not arguable. It is impossible to say that under this covenant a married woman is bound to execute a disentailing deed in order to give herself an estate in fee simple, and to convey to the trustees an estate which she did not take, except potentially, under the will of her father. But it is said that all that is asked is that she should convey the property to the trustees. I say again that to convey the property absolutely is a covenant into which she has not entered. The proper construction is that she shall convey the property for such estate and interest as she takes in it. Then, I ask, inasmuch as she takes an estate tail, how is it possible that she can convey an estate tail so that that estate shall be vested in the trustees of the settle-

ment? It is agreed on all hands that that is impossible, and under these circumstances I come to the conclusion that this estate tail is not bound by the terms of the covenant, that it is property which she cannot convey, an estate and interest in property which she cannot convey, and that the covenant was not intended to apply except to such an estate and interest as she could convey.

There remains the last question, which has been very briefly argued, and which, I believe Mr. *Freeman*, for the trustees, gave up. Can you split the estate tail into an estate for life with remainder, and say you must convey the estate for life to the trustees? My answer is, that that which is given to the wife is not an estate for life with remainder to her children, but an absolute estate tail, and to separate the estate into two would be to create a gift different from that which you actually find in the will of the father.

Therefore, I answer the first question in the negative, and I say that this estate tail is not an estate or interest in possession which is bound by the terms of the covenant.

The claim to the £945 was very properly given up by Mr. *Freeman*, but, if it is necessary to answer that question, I answer it also in the negative.

The costs will, of course, come out of the settlement fund.

Solicitors: *Kime & Hammond*, agents for *Wilson & Son, Louth*
G. A. Hall.

W. L. C.

PEARSON, J.

1883

Nov. 23.

ROLLS *v.* MILLER.

[1883 R. 2413.]

Covenant in a Lease—Restrictions against Trade or Business—Charitable Institution—"Home for Working Girls."

Covenant in the lease of a house that the lessee should not use, exercise, or carry on upon the premises, any trade or business of any description whatsoever :—

Held, that a charitable institution called a "Home for Working Girls," where the inmates were received upon payment of a small sum for board and lodging, but from which no profit was derived, was a business, and came within the restrictions of the covenant.

THIS was a motion on behalf of the Plaintiff, *John Allan Rolls*, for an injunction to restrain the Defendants, Mrs. *Miller* and the trustees of an institution known as the "Home for Working Girls," from using the premises No. 13, *The Paragon*, *New Kent Road*, or permitting the same to be used as one of the homes for working girls in *London*, and from otherwise using the said premises, or permitting the same to be used in breach of the covenant in that behalf contained in a lease dated the 30th of July, 1825.

The trustees of the institution known as the "Home for Working Girls," had in the month of August, 1883, taken a lease of No. 13, *The Paragon*, from *Sarah Miller*, the first Defendant, and had established therein one of the homes, and there was a clause in that lease permitting the house to be used for this purpose. But the Plaintiff, the ground landlord of the house, upon finding that some of the residents in *The Paragon* objected to the "Home" being established there, had brought this action claiming that the Defendants should be restrained from acting contrary to the covenant in the original lease of 1825, which was to this effect, "that the lessee shall not, nor will at any time during the term hereby granted, use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on upon the premises hereby demised any trade or business of any description whatsoever without the consent of the said *John*

Rolls or his assigns, or of the person or persons entitled as aforesaid in writing."

The question now raised was whether the institution known as the "Home for Working Girls" was a trade or business within the meaning of the covenant.

It appeared that the girls received into this institution made small payments for the use of their rooms and for food daily provided for them according to arrangement, but from the yearly accounts of several other "Homes" established by the Defendants it appeared that no profit had ever been made, but, on the contrary, there had been a heavy loss in all the accounts.

Cozens-Hardy, Q.C., and *Butcher*, for the Plaintiff:—

The ground landlord in this case has been called upon by the neighbouring residents in this locality holding their leases from us to put in force the restrictive covenant in the lease of No. 13, in *The Paragon*, we are therefore bound to try the question whether the institution called the "Home for Working Girls" comes within the term "business." In the case of *Bramwell* v. *Lacy* (1), the Court restrained the carrying on of an hospital on the ground that it was a business. There the institution was established for poor persons, and small payments were made by the patients according to their means, and it was not alleged that the hospital was carried on for a pecuniary profit, though about half the patients paid for the medical attendance; but the Master of the Rolls said (2), "The question whether it is a business carried on for the purposes of profit or not, is not, in my opinion material," and his Lordship was of opinion that it was a business, or at all events "in the nature of a business." In *German* v. *Chapman* (3), there was a covenant restraining the lessee from using a house for any purpose other than a private residence and not for any purpose of trade. The house was used for the education and lodging of 100 girls, the daughters of missionaries. It was supported by voluntary contributions, and there was no attempt to make any profit out of it, but it was decided by the Court of Appeal, overruling Vice-Chancellor *Bacon*, that the

(1) 10 Ch. D. 691. (2) 10 Ch. D. 695.
(3) 7 Ch. D. 271.

PEARSON, J. house was not used as a private residence, and was therefore within the restriction of the covenant.

1883

ROLLS v. MILLER.

Oswald, and *McCullagh*, for Mrs. *Miller*:—

The purpose for which this house is used is no more a business than letting lodgings, which could not be prevented. Suppose any person should take a lady or gentleman to board in the house, surely that could not be called a business; here there are many boarders taken, which amounts to the same thing. Again, suppose several persons took a house together, such as bachelors or priests, who often reside together in such a manner, that could not be called a business. This is a charitable institution where no profit is made, and it cannot come under the definition of a trade or business.

W. W. Karslake, Q.C., and *Birrell*, for the trustees of the charity:—

This case has been rested on the decision of the Master of the Rolls in the case of *Bramwell* v. *Lacy* (1), but there the principal complaint of the neighbouring residents was that the hospital was a nuisance owing to a number of sick persons waiting outside, and that contagious diseases were treated at the hospital, which was dangerous to the neighbours. The Master of the Rolls considered this to come within the terms of the covenant, which were very extensive, including "annoyance, damage, injury, prejudice, or inconvenience to the neighbouring premises." In the case of *German* v. *Chapman* (2) the covenant was that the house should not be used or occupied otherwise than as a private residence. Here we have no such words, and if charity does not come under the definition of business, there is no ground for saying we are within the terms of the covenant. The only real definition of the word "business" is an occupation carried on for "profit;" when you depart from that you are lost in the various indefinite meanings of the word. In the *Imperial Dictionary*, for instance, we find "business" a word of extensive and indefinite meaning, "an employment which occupies the attention and

(1) 10 Ch. D. 691. (2) 7 Ch. D. 271.

labour of men for the purpose of profit." We have it in evidence that no profit has been made in these homes for working girls, but, on the contrary, the loss has been considerable, and they are in fact carried on at the cost of the charitable public.

PEARSON, J.:—

I am exceedingly sorry to be unable to decide this case in any way but that in which I am about to decide it. The question is a very short one. The words of the covenant are these, that the lessee "shall not, nor will at any time during the said term hereby granted, use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on, in or upon the premises hereby demised, any trade or business of any description whatsoever." These are the words with which I have to deal. The trustees of a very excellent charitable society have taken these premises for the purpose of converting them into a "Home for Working Girls." There is no rule as to admission, but I am told that they are not admitted "indiscriminately" into this community, whatever that may mean. The terms of admission are described on the first page thus:—Rent of bedroom, including use of dining and sitting rooms (with library), 2*s.* 6*d.* and 4*s.* per week; board, *i.e.*, breakfast, dinner, and tea 4*s.* 0*d.* per week, subject to arrangement, separate meals so much, and then there is a passage further on saying what the rules as to residence are, and which simply relate to the way in which the inmates are to conduct themselves in the service of the house, and the sort of work expected from them. There is nothing else, I think, of importance there.

The object of the charity is to take in temporarily, or for a more extended period, such working girls as have not homes or cannot conveniently use their homes. As I have said, it is an exceedingly laudable object, provided it is not carried on in a place where there are covenants to the effect that such a business shall not be carried on. It is not actually carried on for profit. I am told that the balance-sheets of other similar "homes" shew a loss, and the business, if it be a business, is not carried on for profit in this sense—that the object of the charitable persons who open these homes is not to make a profit. If profit is made, so

PEARSON, J. 1883 ROLLS v. MILLER.

much the better, because then they will have more money at their disposal which they can apply to the purposes of the charity, and if a loss is incurred, then the general funds of the charity are behind them in order to sustain that loss. It cannot, therefore, be said to be in any sense a business which is carried on with the object of making a profit. But is it or is it not a business? because if it be a business then it is to my mind, as it was also to the mind of the late Sir *George Jessel*, immaterial whether profit is or is not the object of it.

The covenant here is this, that no trade or business of whatever description shall be carried on, and to my mind the word "business" is a very much larger word than "trade," and you are not to reduce in a covenant of this kind the word "business" simply to that which would be a trade. The word "business" is inserted in these covenants in order to include divers occupations which would not strictly come within the meaning of the word "trade," and in this covenant there is certainly no limitation of the word "business" because it is "trade or business of any description whatsoever." Now is this or is it not a business? The persons who hold the house are not the persons who live in it; the persons who manage the house are not the persons who are entertained in it. Those who come to the house come there and go from there at their own free will, and apparently they come there for a shorter or a longer period; they pay certain rents and other sums of money according to what they have in the house, whether it be simply for bedrooms or whether it be for bedroom and board as well. Under these circumstances I think the occupation of this house is an occupation of something very different from that of a private dwelling-house, and I know no other word in the language which would express the purpose for which the house is open better than the word "business." I am of opinion that it is open for a "business," for something about which people employ themselves sedulously, something of a nature which would be an ordinary business if it were carried on by an individual with the intention of making a revenue out of it. I do not think that the counsel who have argued the case on behalf of the Defendants would contend, if this home was not a home controlled

and supported by a charitable society, without any desire whatever of making a profit out of it, that it was not a business; in other words, were the house taken for the same purpose by a private individual with the intention of making as much gain out of it as he possibly could, I do not think they would contend that there was not a business being carried on in the house.

Then if that be so, I cannot say that there is any distinction made in this covenant between a business carried on for profit and a business carried on for charitable reasons only. It is nevertheless a business of some description, and it comes within the covenant, and therefore I am bound to restrain it.

No doubt the objection has been raised that this is an interlocutory application. The case is one of some difficulty, and it is said that it is not a proper course to make an order upon an interlocutory application; but the point being contained in a very few lines, and there being really no necessity for any amount of evidence upon it, I think it better at once to express my opinion upon the case, in order that, if the parties like to go to a superior Court and challenge my decision, that may be done in the shortest possible time and at the least possible expense to all parties interested. I will therefore grant an injunction in the terms of the notice of motion until the hearing or further order.

Solicitors: *Markby, Wilde, & Burra; Miller & Pook; Nisbet & Daw.*

T. W. G.

PEARSON, J.

1883

Nov. 19, 27.

KEAY *v.* BOULTON.

[1882 K 1282.]

Will—Construction—"Heirs"—Gift of Real and Personal Estate together—Substitution.

A testator gave, devised, and bequeathed to his wife all his property, real or personal, on trust for herself for her life, and after her death the whole of his property was to be equally divided among all his children, "or such of them as may be then surviving, or their heirs." The testator had five children, all of whom survived him. Of these children two daughters died before the wife, leaving children:—

Held, that the word "heirs" had a twofold meaning, viz., heir-at-law as regarded the real estate, and next of kin as regarded the personalty:

Held also, that the property was divisible in fifths,—each surviving child of the testator taking one-fifth, and the heir-at-law and next of kin of each deceased daughter taking between them (according to the nature of the estate) one-fifth share.

Wingfield v. *Wingfield* (1) followed.

Smith v. *Butcher* (2) distinguished.

JOHN KEAY, by his will, dated the 1st of March, 1845, gave, devised, and bequeathed unto his wife *Elizabeth Keay* "all the property of which I may die possessed, real or personal, upon trust to use and enjoy all such parts thereof as shall yield income during the term of her natural life. And after the decease of my said wife, I request the whole of my property be as equally divided as possible among all my children by my said wife, or such of them as may be then surviving or their heirs. I also constitute and appoint my said wife sole executrix to this my last will and testament." The testator died on the 24th of March, 1866; his widow died on the 26th of June 1882. The testator had six children by his wife, one of whom died in his lifetime an infant four months old; the other five survived him. Two of the children, Mrs. *Boulton*, and Mrs. *Cartwright*, died before the widow, respectively leaving children them surviving. Each of the two daughters of the testator who so died left a son surviving her who was her heir-at-law. The object of this action was to ascertain the true construction of the will.

(1) 9 Ch. D. 658. (2) 10 Ch. D. 113.

Cozens-Hardy, Q.C., and *S. Lee*, for the surviving children of the testator:—

The true construction of the will is this. There might be three states of circumstances—(1.) All the testator's children might be alive at the death of his wife; (2.) Some only of the children might be living at that time; (3.) None of the children might survive the wife. In the first case all the five children would take; in the second the survivors would take; in the third the heirs (whatever that may mean) of the deceased children would take: *Sturgess* v. *Pearson* (1); *In re Sanders' Trusts* (2).

Cookson, Q.C., and *Byrne*, for the children of Mrs. *Boulton*, and Mrs. *Cartwright*:—

The surviving children do not take the whole; the heirs or next of kin (whichever is the right construction) of the deceased children share with the survivors. The word "heirs" is a word of substitution, not of limitation: *Wingfield* v. *Wingfield* (3); *King* v. *Cleaveland* (4); *In re Philps' Will* (5).

Cozens-Hardy, in reply.

PEARSON, J., held that the surviving children and the "heirs" of the deceased children took together as forming one class.

The question was then argued whether the word "heirs" was used in its strict technical sense, or whether it included next of kin.

Cookson, Q.C., and *Byrne*, for the next of kin of the deceased daughters:—

The word "heirs" is used in the popular sense of "representatives"; it means real representative in the case of real estate, and personal representative, *i.e.* next of kin, in the case of personal estate: *De Beauvoir* v. *De Beauvoir* (6); *Finlason* v. *Tatlock* (7); *Powell* v. *Boggis* (8); *In re Steevens' Trusts* (9). When both real

(1) 4 Madd. 411.
(2) Law Rep. 1 Eq. 675.
(3) 9 Ch. D. 658.
(4) 4 De G. & J. 477.
(5) Law Rep. 7 Eq. 151.
(6) 3 H. L. C. 524.
(7) Law Rep. 9 Eq. 258.
(8) 35 Beav. 535.
(9) Law Rep. 15 Eq. 110.

PEARSON, J. 1883 KEAY v. BOULTON.

and personal estate are given together, and there is no blending of them into one fund on the face of the instrument, the word "heir" is an elastic term, and ought to be construed *reddendo singula singulis*. *Wingfield* v. *Wingfield* (1) is in point, and it is distinguishable from *Smith* v. *Butcher* (2).

H. A. Giffard, Q.C., and *Farwell*, for the heirs-at-law of the deceased daughters:—

The second alternative has happened, and there is an original gift, not a gift by way of substitution, to the heirs of the deceased daughters. *De Beauvoir* v. *De Beauvoir* (3) recognised the rule that the word "heir" *primâ facie* means the heir-at-law of real estate as *persona designata*, even in the case of a gift of personalty. But if there is a gift of a mixed fund, the presumption of an intention to give to the heir-at-law as *persona designata* is greater. It is admitted that the heir-at-law takes the real estate; what is there to take the personalty from him?

[PEARSON, J.:—Is it not the intention that the family of a deceased child should be benefited?]

Smith v. *Butcher* is in our favour.

[PEARSON, J:—There the gift was of personal estate only to the heir; if the heir-at-law did not take it there was nothing for him to take.]

In *Wingfield* v. *Wingfield* the ordinary rule was departed from on the ground of a particular intention shewn by the testator, but there was nothing to alter the general rule: *Jarman* on Wills (4); *Theobald* on Wills (5). *Wingfield* v. *Wingfield* can hardly be reconciled with *Smith* v. *Butcher*.

PEARSON, J.:—

At present I am at a loss to reconcile some of the *dicta* in *Smith* v. *Butcher* with the decision in *Wingfield* v. *Wingfield*. I will take time to consider my judgment.

(1) 9 Ch. D. 658.
(2) 10 Ch. D. 113.
(3) 3 H. L. C. 524.
(4) 4th Ed. vol. ii. p. 78 *et seq.*
(5) 2nd Ed. p. 273 *et seq.*

Nov. 27. PEARSON, J. (after reading the will, and stating the facts), continued:— PEARSON, J. 1883 KEAY v. BOULTON.

The first contention was that the three children of the testator who survived the widow take the whole of the property equally between them. I have already decided that that is not the true construction of the gift, but that the gift is to be read as if the words had been "among all my children, or such of them as may be then surviving, and the heirs of such of them as may be then dead," and upon further consideration I see no reason to alter that decision.

The next question is, what is the meaning of the word "heirs," the gift including both real and personal property? Is the word "heirs" used in the sense of *persona designata*, indicating the person who would have been the heir-at-law of real estate of a child who had died intestate, or is it to be read in a qualified sense, so as to give the real estate to those persons who would in the event of the intestacy of the deceased children have taken their real estate, and the personal estate to their next of kin according to the *Statute of Distributions?* I think this case is to be decided by authority, and by authority only. No doubt the word "heir" has a technical meaning, *i.e.*, the heir-at-law of real estate, and if there is nothing in the will to shew a contrary intention the heir-at-law must take the property as *persona designata*. The question, therefore, is whether according to the authorities the word "heir" is in such a case as the present to be restricted to its technical meaning, or whether the cases do not decide that the word is to be read in a double sense, *i.e.*, as the heir-at-law of real estate in relation to real estate, and as the persons who may be in a popular sense called the heirs of personalty in relation to the personal estate? There are many cases on the subject, and the first to which I will refer is *Vaux* v. *Henderson* (1). There a legacy of £200 was given to *A.*, "and failing him, by decease before me, to his heirs." *A.* died before the testator, and Sir *W. Grant*, M.R., held that the legacy belonged to the next of kin of *A.* living at the time of the testator's death. In other words, he held that the word "heirs" was to be construed as meaning the next of kin, or heirs of personalty. The

(1) 1 J. & W. 388.

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next case to which I will refer is *Doody* v. *Higgins* (1), and that case to my mind is one of considerable importance, because it was decided by Vice-Chancellor *Turner*, one of the Judges who afterwards, as Lord Justice, decided *King* v. *Cleaveland* (2), in which the words "legal personal representatives" in a bequest of personalty were construed as meaning "next of kin." In *Doody* v. *Higgins* the will of *John Adams*, after directing the sale of the whole of his estates not before disposed of and the calling in of his securities, "to pay the following legacies," and specifying certain pecuniary legacies, continued: "the residue of my estates I estimate at about £6000, which, be it more or less, it is my desire that it be divided equally, share and share alike, amongst the following persons, or their heirs, for ever," and the will then named the persons. The Vice-Chancellor said (3): "The first question is, who were the persons intended by the testator to take under the disposition of the residue to 'the following persons or their heirs.' I have looked into the cases which were cited in the argument, and into many other cases upon this point, and I think that the words 'or their heirs' must be construed as words of substitution; and that the word 'heirs' must be construed heirs according to the nature of the property, that is, next of kin; the property being given as money to the persons intended to take."

That case came afterwards before Vice-Chancellor *Wood* (4), upon a question as to the form of the order, and the Vice-Chancellor in his judgment referred to *Mounsey* v. *Blamire* (5), and quoted from what was said by Sir *John Leach*, M.R., in that case: "'Where the word "heir" is used to denote succession, there it may be well understood to mean such person or persons as would legally succeed to the property according to its nature and quality'" (that in the case of personal property would of course include a widow), "'as in *Vaux* v. *Henderson* (6), which has been principally relied upon in the argument, and in the familiar case of a gift of personal property to a man and his heirs.'" Vice-Chancellor *Wood* continued (7): "He then goes on to say, that

(1) 9 Hare, App. xxxii.
(2) 4 De G. & J. 477.
(3) 9 Hare, App. xxxv.
(4) 2 K. & J. 729.
(5) 4 Russ. 384.
(6) 1 J. & W. 388.
(7) 2 K. & J. 736.

where, on the other hand, the word is used, not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, then the Court will not depart from the strict sense of the word 'heir,' a remark which does not apply to the present case, the decision of Lord Justice *Turner* in this case having determined that in the will before me the word 'heirs' is not used to describe a legatee, and is not to be taken in its strict sense. The decision in *Mounsey* v. *Blamire* (1) is inapplicable to the present case; but it is clear from what I have read that Sir *John Leach's* view was, that in a case like the present the parties entitled would be 'such persons as would legally succeed to personal property' claiming *ab intestato*. So in *Gittings* v. *M'Dermott* (2), where there was a residuary bequest to each of the testator's sisters *Mary* and *Sarah*, 'and upon their deaths respectively to their heirs,' *Mary* and *Sarah* having died during the testator's life, Sir *John Leach*, M.R., was of opinion that the residuary gift did not lapse upon their deaths, but that it went 'to those who would have taken it by succession had the persons to whom the life interest was given survived the testator' (3). They again would be the widow and other persons entitled under the *Statutes of Distribution*. And Lord *Brougham* expressed himself to the like effect in the same case when it came before him on appeal, speaking of 'the heir of the personalty' (4), as the person entitled; and again in a subsequent page (5) he adds this: 'It may be further observed that giving to *A.*, and on his death to his heirs, refers to two things which must take place without any such provision,—the death of *A.*, and his heirs taking after him, that is, the property going to those to whom the law gives it; so that it is only saying "let those take it who may be entitled to take it.' And so again in *Withy* v. *Mangles* (6), Lord *Cottenham*, C., speaks of 'heirship according to the nature of the property.' He says, 'A testator may indeed so express himself as to intimate an intention that the rule of the statute should prevail, as in *Stamp* v. *Cooke* (7).

(1) 4 Russ. 384.
(2) 2 My. & K. 69.
(3) Ibid. 73.
(4) 2 My. & K. 76.
(5) Ibid. 81.
(6) 10 Cl. & F. 215, 253.
(7) 1 Cox, 234.

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So in *Lowndes* v. *Stone* (1), a gift of the residue of the estate and effects to next of kin or heir-at-law, was held to include nephews with an uncle, the words implying heirship according to the nature of the property.'"

I read this passage as shewing that not only each of the Judges whose opinion he cites, but Vice-Chancellor *Wood* himself was of opinion that you might without any great impropriety speak of the "heirs" of personal estate as well as of the "heir" of real estate. There is a case of *White* v. *Briggs* (2), in which the word "family" was used, which is no doubt a word of large and flexible meaning. There the testator gave to his wife for her life all his property, both real and personal, and he directed that after her death his nephew was "to be considered heir to all my property not otherwise disposed of." And the testator further directed that "whatever portion of my property may hereafter be possessed by him, shall be secured by my executors for the benefit of his family." The will contained these further gifts, "after the decease of my wife my real property . . . I leave to my nephew before mentioned, and his heirs and family . . . My nephew will further have the benefit of my personal property variously situated, and his heirs and family after him," and Lord *Cottenham*, having determined that as regards the real estate the word "family" meant the heir-at-law, held that in the other gift of the personal property to the nephew, the same word meant the "next of kin." I think Lord *Cottenham* would have had no difficulty in holding that in a gift of real and personal estate together the word "heir" might have one meaning as to the real estate, and another meaning as to the personal estate—that it might mean the heir-at-law in relation to the real estate, and the next of kin in relation to the personal estate. I now come to *De Beauvoir* v. *De Beauvoir* (3), and I think it has no bearing on the present case, and cannot govern it. Lord *St. Leonards* there came to the conclusion (and no one could well have come to any other) that the intention of the testator was that the person who was to take the real estate should also take the personal estate, and that, when he had shewn an intention that the real and personal estate

(1) 4 Ves. 649. (2) 2 Ph. 583.
(3) 3 H. L. C. 524.

should go together, there was no rule of law which compelled them to be separated.

I now come to *Smith* v. *Butcher* (1), and *Wingfield* v. *Wingfield* (2). To my mind *Wingfield* v. *Wingfield* is hardly distinguishable from the present case, and in it Vice-Chancellor *Hall* came to the conclusion that the word "heir" in the will then before him had two meanings—"heir-at-law" as to the real estate, and "next of kin" as to the personal estate. But *Smith* v. *Butcher*, which was decided by Sir *George Jessel*, is said in a great measure to govern the present case. There the testator gave the income of the rest of his property "to be equally divided among the children of my brother during their lives, and on the decease of either of them, his or her share of the principal to go to his or her lawful heir or heirs." The will was not attested so as to pass real estate. *Jessel*, M.R. held that the words "heir" or "heirs" having a technical meaning, there was nothing in the will to shew that the technical meaning was not the meaning of the testator. I do not think that that case decides the case now before me, but, assuming that the decision was perfectly right, I think it is still open to me to decide, and I think I ought to decide, the present case in a different way. In *Smith* v. *Butcher* there was a gift of personal estate to tenants for life, with remainder over on the death of each "to his or her lawful heir or heirs." It may well be that in such a case you ought to read the word "heir" in its strictest sense, and to say that the heir takes as *persona designata*. But in the present case the gift is in the first instance to the testator's wife for her life, and after her death to be equally divided among all his children by her, or such of them as might be then surviving, or their heirs. The heirs are not to take by way of remainder, but, in a certain sense, by way of substitution. It is an independent gift to them; they take in the place and instead of the children who have died before the tenant for life. I think that enables me to give to the word "heirs" a different meaning from that which the Master of the Rolls gave to it in *Smith* v. *Butcher*. I think it shews an intention on the part of the testator that the "heirs" are to take in exactly the same way as if the deceased children had died

(1) 10 Ch. D. 113. (2) 9 Ch. D. 658.

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intestate, *i.e.*, the heir-at-law is to take the real estate, and the "heirs" of personalty—the next of kin—are to take the personal estate. I think that is the right conclusion in the present case, and I so decide. I disclaim any intention of guessing at the testator's meaning, and I decide the case entirely upon the authorities by which I believe it is governed.

Solicitors for all parties: *Paterson, Snow, Bloxam, & Kinder*, agents for *Brookes & Lee, Whitchurch.*

W. L. C.

PEARSON, J. 1883 *Nov.* 24, 26; *Dec.* 1.

In re ELDERTON (INFANTS).

Infant—Custody—Right of Mother—Breach of Marital Duty by Father—Infants Custody Act, 1873 (36 & 37 *Vict. c.* 12), *s.* 1.

In determining whether the custody of an infant child ought to be given to or retained by the mother, the Court will take into consideration three matters—the paternal right, the marital duty, and the interest of the child.

For this purpose the marital duty includes, not only the duty which the husband and wife owe to each other, but the responsibility of each of them towards their children so to live that the children shall have the benefit of the joint care and affection of both father and mother. In a case where a father had committed a breach of the marital duty as thus defined:—

Held, for this among other reasons, that the mother, in whose custody two children of the marriage of tender years were, ought to retain the custody until further order.

THIS was a petition, under the *Infants Custody Act*, 36 & 37 Vict. c. 12, presented by Mrs. *Elderton*, the wife of General *Elderton*, an officer in Her Majesty's army, praying that the General might be ordered to allow the only children of the marriage, two boys named *Arthur* and *Rowland*, aged respectively eight years and seven years, to remain in their mother's custody until they should respectively attain the age of sixteen years, subject to such regulations as to the Court should seem proper.

The material facts of the case are fully stated in the judgment of the Court.

Cozens-Hardy, Q.C., and *Farwell*, for the mother:—

The Act 36 & 37 Vict. c. 12, s. 1, gives the Court the widest

possible discretion as to the custody of infants, and enables it to take into consideration all the facts of the case. The Act has conferred new rights on the mother: *In re Taylor* (1).

[PEARSON, J.:—*Andrews* v. *Salt* (2) shews that the Court will have regard to the fact that a child's education has been going on for years without any interference by the person who has a right to interfere.]

In such cases it has been held that a father has abandoned his right to control the education of his child: *In re Clarke* (3). The Court ought to consider by whose fault the separation between the husband and wife has been brought about. Here it has been caused by the unfounded charges which the General has brought against his wife, and the unreasonable things which he has required her to do. If the General is able to maintain the children he ought to be required to do so. Indeed, if the children are placed in the wife's custody by the order of the Court, he will be liable at law for the reasonable expenses of providing for them, as part of the reasonable expenses of the wife: *Bazeley* v. *Forder* (4).

Higgins, Q.C., and *F. Whinney*, for the father:—

Primâ facie the legal rights of a father in relation to his children are sacred. He has duties both legal and moral towards them, and it is right and natural that he should desire to have the custody of them. In *In re Halliday's Estate* (5) Lord Justice *Turner* said, "I shall decide, if possible, rather in favour of the paternal right than against it."

The paternal right stands before everything, and in order to induce the Court to displace it an overwhelming case of breach of duty on the part of the father must be shewn: *In re Fynn* (6); *Symington* v. *Symington* (7). No such case is made out here. The most that is shewn is extreme irritation and ill-temper on the part of the husband towards the wife; it is not shewn that he is generally ill-tempered. This is not a sufficient reason for

(1) 4 Ch. D. 157.
(2) Law Rep. 8 Ch. 622.
(3) 21 Ch. D. 817.
(4) Law Rep. 3 Q. B. 559.
(5) 17 Jur, 56, 57.
(6) 2 De G. & Sm. 457.
(7) Law Rep. 2 H. L., Sc. 415.

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depriving him of the custody of his children. He may have acted violently and harshly to his wife, but there is no evidence of any such acts towards the children. In *In re Taylor* (1) the child was only three years old; here the children are eight and seven. In that case liberty was given to the father to apply for a scheme for the maintenance and education of the child on his attaining the age of seven. At any rate the father ought to have the opportunity of frequent access to the children.

PEARSON, J.:—

This is a petition by Mrs. *Elderton*, the wife of General *Elderton*, under the Act which is known as "the *Infants Custody Act*," asking that she may be allowed to retain the custody of her children, two boys of tender years. I need not enter into the scope or proper construction of that Act, because the rules for my guidance have been already laid down by very high authority. The late Lord Justice *Turner*, in *In re Halliday's Estate* (2), and the late Sir *George Jessel*, M.R., in *In re Taylor*, have laid it down that there are three matters which the Court ought to keep in view in determining what are the mother's rights under this Act, and these three matters are the paternal right, the marital duty, and the interest of the infants; and I do not think I shall be very far wrong if I say that I ought to give effect to the paternal right, unless there has been so grave a breach of the marital duty that it would not be proper to give effect to it, or unless the interests of the infants require the Court to interfere with it.

With regard to the paternal right in this case, I will dispose of it at once. The charges made by Mrs. *Elderton* against her husband are in effect charges of violence proceeding more or less from intemperate habits. With regard to this I may say that, inasmuch as, owing to circumstances to which I shall presently refer, General *Elderton* and his wife have been living, the one in *India* and the other in *England*, from the year 1876 down to 1881, when the General returned to *England*, any act of violence alleged against him must necessarily be of very old date, and the knowledge possessed by her of his intemperate habits must necessarily be very small, and in my judgment there is hardly a

(1) 4 Ch. D. 157. (2) 17 Jur. 56.

tittle of evidence in support of those charges with the exception of that which General *Elderton* has himself furnished by the letters which he wrote to his wife.

With regard to a more serious charge which was brought by Mrs. *Elderton* against her husband in the Divorce Court, that was disposed of there, and he was acquitted of it. I need, therefore, hardly say that, if this were an application simply to remove the children from General *Elderton's* custody, I should undoubtedly come to the conclusion that there was no ground or justification for the interference of the Court. General *Elderton* may not be the wisest or the most moderate of men, he may not be the man whom this Court would select as the guardian of infant children if it had to make a selection indiscriminately from all the world, but I see no reason whatever for supposing that he is not fond of the boys, as fond as he can be when he has not seen them, I think, except upon one occasion, since the birth of the eldest; nor have I any reason to suppose upon the evidence before me that, either by his example or intentionally, he would do anything detrimental either to their moral or to their physical welfare. I repeat, therefore, that if Mrs. *Elderton* was not present, and if this was simply an application to interfere with the paternal right of General *Elderton*, I should refuse it.

This brings me to the second matter which I have to consider, the marital duty, and with regard to that I must enter more at length into the circumstances of the case. But, before I do that, it may be well that I should deal with the charges made against Mrs. *Elderton* by her husband on the present occasion. He has chosen to go into the whole history of his wife from a period antecedent to their marriage. He has raked up all sorts of imaginary accusations against her, and has filled the affidavits, which he has thought fit to file, with the grossest possible imputations against her character. He has charged her with persistent levity of conduct from the earliest period of her life, from a period antecedent to their marriage (which he ought to have left alone), and at last it culminates in a passage in one of his affidavits, in which (referring to a lady whose name I need not mention), he says, "She lived with me in 1868, a circumstance with which I acquainted my wife before marriage. She remarked that 'it

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did not signify, all men acted similarly.' Her brother-in-law censured her severely for viewing the matter in so light a manner. Having similarly erred herself she could well afford to look leniently on such faults in others." I think it right to say from the evidence before me that this is one of the most unjustifiable, base, and unmanly imputations ever thrown against any wife or woman. There is not the slightest ground for saying that there is any imputation whatever upon the conduct of Mrs. *Elderton* in that respect. Now, the facts which I have to deal with with regard to the marital duty are these: The parties married in 1870. At that time General *Elderton* was a widower. Unfortunately, between the death of his first wife and his contracting his marriage with his second wife, he had formed a connection with another lady, by whom he had a child. I mention that merely that it may not be supposed I have overlooked it, but it will form a very slight ingredient, if any ingredient at all, in the judgment which I am about to pronounce. In 1871 the General went to *India*, and in August of that year Mrs. *Elderton* joined him. She stayed with him in *India*, and in the month of February, 1875, the eldest son, *Arthur*, was born. Mrs. *Elderton* returned to *England* in April, 1876, with the consent of her husband, and, as I gather, on account of the health of her child, and from that time she has remained in *England*. In October, 1876, the second boy was born. During the time that she was absent from *India* up to the year 1879 she was in correspondence with her husband. Her letters have not been produced. The General's letters have. The letters shew the most extraordinary variation of feeling; at times they were written in the most affectionate manner, and then a few months afterwards, apparently without cause, their tone changed altogether, and they became violent and more or less abusive. The only ground, without having read all these letters, that I have found, or that has been suggested to me for the change of tone, was a difference between the husband and wife with regard to the wife's intercourse with her brother-in-law, with whom the General had quarrelled, and with regard to her intercourse with a lady to whom the General had introduced her. I need hardly say that any difference of opinion on these points was not sufficient to justify the language which is to be found in

his letters. I may add that the General seems to have entertained very early an almost insane hatred of his mother-in-law. What was the origin of that feeling I know not, and I care not, but it will account for some of the expressions in letters to which I must refer. Matters went on in this way until the month of September, 1878, and in the month of October, 1878, Mrs. *Elderton* received from the General a memorandum in these words: "1878. September 27th. Balance due 'the Resurrectionist' from the £50 additional allowance for the official year ending April, 1879, after deducting the £20 paid to *Clayton & Co.*, embezzled by her, £30. Should 'the Resurrectionist' require any further pecuniary assistance she must obtain it from her relations, and repay them at the death of 'Old Mother damnable,' for not another shilling will she get from her duped husband. She cannot eat her cake and have it. If 'the Resurrectionist' only tried to live within her means, in a style suited to the wretched position in which her deceit and falsehood have placed her husband, £250 per annum, with the assistance derived from 'Old Mother damnable,' would be ample to meet all expenses. £200 is all that she ought to have."

This document, Mrs. *Elderton* says in her affidavit, "was enclosed in an envelope containing large photographs of myself, on which was written by my husband, 'For the Resurrectionist, *Grey Friars, Chester.* What was adored, but is now abhorred—boil it down;' and there was also another packet of smaller photographs of myself inclosed in an envelope, on which was written by my husband: 'Returned. Would to God I could get rid of the original, and thus escape further disgrace.'" Then Mrs. *Elderton* goes on to say, that by "the Resurrectionist" was meant herself, and by "Old Mother damnable" her mother. About the same time the General wrote a letter to his wife, which is also dated the 27th of September, 1878, in which he repeats pretty nearly what he had said in the memorandum: "I trust that you received your hated photos. safely. It was such a relief to get rid of them. Would to God I could cast off the original as easily. The last piece of advice I shall ever give you is this, shun that fiend of hell, for if ever I hear that you have held the most indirect communication even with her since May 18th,

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1878, you shall smart for it. I am sure to hear of it. The fiend thinks you what I think you, 'a vain deceitful tufthunter.' I don't think that a more faithful opinion was ever formed of a person. I declare to God I never in my long life met so contemptible a character; for money or admiration you would stick at nothing. Next, you will want to sell the silver plate off my darling's coffin, the coffin which now contains the poor heart which was once fondly your own. Her very ashes you would convert into money, were it possible. My blood runs cold when I think of you and your disgraceful conduct. Oh, my joy will be indeed great when I can remove my darling boys from your abominable influence. You are a worthy daughter of a worthy mother. I don't know which is the most despicable character. Your relations will be somewhat startled when the public prints shew what you really are. You will have to drop the 'Duchess' then, and hide your diminished head. I have over and over again told you that this noble woman would separate us, and she has most effectually done so. I will not attempt, *Anna*, to describe my hatred for you, for no word at present invented could do so." In February, of the next year, he sent her a form of statutory declaration which he wanted her to make. I need not read it, but the effect of it was that she would undertake to hold no intercourse with her brother-in-law, or with the lady to whom I have referred, and she was also to undertake to make no further inquiries about her husband's conduct. Whether she had made any inquiries about it, or what, if she had, those inquiries were, there is no evidence before me. Apparently, the General was angry about some inquiries which she had made, and therefore he called upon her to make that statutory declaration. I need hardly say that she was advised not to make it. But, on the 21st of July, 1879, the General wrote her another letter, which, so far as it is necessary for me to read it, ran thus: "All letters which you may address to me after the receipt of this will be returned to you by the 'Dead Letter Office,' for I decline holding any further communication with you, except through Colonel *Yolland*, the man for whom you professed to entertain such thorough contempt that you could not be prevailed upon to call him 'uncle,' until you required his money and assistance. Is

there any mean, base, unnatural, unwomanly act that you would not commit for admiration and filthy lucre? I verily believe not. What a mass of deceit and falsehood you have proved yourself to be. How applicable to you is *Paul's* speech to *Bar-Jesus*, 'Oh, full of all subtilty and all mischief, thou child of the devil.'" That is the way in which he addresses his wife. I confess that I still entertain the opinion which I intimated to his counsel during the argument, that it would have been better for General *Elderton* to have sheltered himself under the suggestion made by his wife, that he had at some time indulged in intemperate habits, which had unfortunately had the effect of making him lose at times the control of his better reason. That, however, is denied in the affidavits which he has put in, and I suppose he wishes me to arrive at the conclusion that in his cool moments and with the full possession of all his faculties he wrote these letters to his wife, meaning every word of that which he wrote. After this letter of the 21st of July, 1879, the correspondence with his wife appears to have ceased. He had told her that all her letters would be returned through the "Dead Letter Office," and in one of his affidavits he says that from that time he did not hear from his wife. From July, 1879, until February, 1880, he seems to have obtained news of his children through a friend who went to *Chester*, and made inquiries after them. That friend, he says, died early in the year 1880, and from the beginning of the year 1880, down to December, 1881, the General, according to his own statement, was content to remain without hearing a word either of wife or child. In December, 1881, he returned to *England*. There was then a fresh opportunity for him to obliterate all the past, and I have very little doubt that if, upon his return to *England*, he had sat down and written a kind and affectionate letter to his wife, and, following up that letter, had gone to live with her, the Court would never have heard a word of this petition, nor would that still more disagreeable petition in another Court have been presented. Unfortunately, when the General returned home, he seems not to have got rid of his feelings towards his wife, and one of his first proceedings in this country was to write to his agents, Messrs. *King & Co.*, a letter which he directs them to communicate

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to his wife. (It must have been written some time in the month of December, 1881.) It runs thus:

"Dear Sirs,—Kindly inform my wife that she must be prepared to join me on the 31st of January, 1882. Should the friends in whose hands she has unreservedly placed herself persuade her to oppose my wishes, discontinue her allowance, please, entirely from the above date, and advertise in three of the leading newspapers, as follows: 'My wife, *Anna Elizabeth Elderton, née Anna Elizabeth Jones*, having left my protection, I will be answerable for no debts that she may contract.' An action shall then be brought to decide in whose custody the children are to be placed. Kindly listen to no excuse, regard this as final. My wife is to bring all bed and table linen, knives, forks, and plated articles, also everything she may value; the remainder must be disposed of, as I will not pay a shilling for warehouse rent. On the 20th of January, 1882, I will give instructions regarding the disposal of the luggage. I write this early, so that my wife may have ample time to pack, and give her servants the usual month's notice. I will not permit anyone who has served her to enter my doors now that I am in *England*. Pay no bill without my written or verbal instructions, please."

Then follows this postscript: "Kindly send this letter, or a registered copy of it, to my wife, and tell her that, if she will give up the children, she may, until her mother's death, live separately, and I will allow her £100 per annum." That was written, as I have said, some time in December, 1881. The General then required that the children should be brought to see him at *Liverpool*. This was not done in consequence of their weak state of health at that time, but arrangements were made for his seeing them at his wife's mother's house at *Chester*. The arrangement was made for the 19th of December, and on the 18th of December he wrote a letter to his wife of which I need only read this passage, "I may here mention that, if you decide to live under the same roof with me, we shall be entirely separate, meet only at meals, and speak only when the interests of the children require our doing so," and on the 19th of December, the day on which he had the interview with the children, he left this letter for his

wife at the house, having written it before he went there (it is in the form of a memorandum), "I told you before, and I repeat it now, that I should infinitely prefer your remaining with your mother, during her lifetime" (I am only reading part of it) "receiving £100 per annum, and allowing me sole charge of the boys. You are well aware that they would meet with the utmost care and love. You could visit them whenever you felt disposed," and it ends with this: "Yes, I always write to you in the form of a memo. and as though I were writing for the papers, as I am well aware that every unprincipled blackguard of your acquaintance reads them."

Now these are the letters which this gentleman thought fit to write, immediately on his return to this country, to a wife who had had the charge of his children during the whole time of his absence in *India*, to a wife against whom, I venture to say, there was not a tittle of evidence that she had misconducted herself as a wife, because the evidence undoubtedly shews that there was no complaint by him whilst they were living together in *India*, and that they parted on the best of terms, and I cannot find a single complaint by him of any act done by her during the whole time she was separated from him, and living by herself in *England*, except as regards such communication as she may have had with her brother-in-law, and the lady to whom the General objected.

Now let me consider what is the nature of the marital duty? I say most distinctly that persons who choose to enter the sacred bonds of marriage not only undertake to conduct themselves to one another so that they shall fulfil the vows which they have taken at the altar, but also take upon themselves a responsibility towards such children as they may have so to live that those children shall have that to which they are entitled, the benefit of the joint care and affection of both father and mother, and neither of them is entitled so to act as to deprive the children of that which they have thus guaranteed to them. Let me then look at the letters which the General has written. Does he offer, when he comes back to *England*, to put his wife in that position in which as a wife and a mother she ought to be placed? Does he propose to live with her as a wife and a mother? Far from

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it. His first desire is, if possible, to get rid of her, that she shall go and live away from his house, and the next intimation which he gives her is this. If you will not live with your mother, but will insist on living in the same house with me, we must live apart, we shall meet only at meals, and speak only when the interests of the children are concerned. I ask, what wife, who had a proper respect for herself, could accept such terms? I ask how is it possible that the children should have that to which they are entitled in a house so conducted between the father and the mother? I am of opinion, therefore, that there has been here a breach of the marital duty. I am of opinion that at the present moment the General's house is so constituted that his children cannot have in it that joint care and affection of their father and mother which they ought to have, and I consider that the main and principal cause of this breach of the marital duty is General *Elderton* himself. I do not forget that in the year 1882 Mrs. *Elderton* was so ill-advised as to present a petition in the Divorce Court against her husband, charging him with adultery in the months of February, March, and April, and that that petition was dismissed. I do not for a moment suppose that that petition has not widened the breach between the parties. But the conclusion at which I have arrived is this, that the breach existed before that petition was presented, and that the origin of the differences between the husband and the wife which prevented them from living together and from giving to the children that joint protection to which they were entitled was on the side of General *Elderton*. Under these circumstances I think I am bound to consider the third matter which the Lord Justice *Turner* has pointed out for my guidance—the interest of the children. The elder child is not quite nine years old, the younger is seven, and I have medical evidence that both the children are weakly, delicate, of nervous temperaments, requiring excessive care, and that they are not fit to be sent to school. Under such circumstance I think it would be an act of cruelty to remove them from the care of their mother. I do not intend at the present moment to fix any definite period for which the mother is to have the custody of them. I mean, on the contrary, to follow what Sir *George Jessel* did in *In re Taylor* (1), that is, to order that the

(1) 4 Ch. D. 157.

children do remain in the custody of their mother until further order. The father must, of course, have all proper access to them, and he will have liberty to bring into Chambers a scheme for their maintenance and education, whenever he pleases. But I throw this out for his guidance, that at the present moment I think both the children are too young and too tender to be sent to school, and I hope, therefore, that he will not be premature in bringing any such scheme into my chambers.

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I have only to add that the General must pay the costs of the petition.

Solicitors: *W. H. Phelan; Charles J. Guy & Co.*

W. L. C.

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PEARSON, J. 1883 Dec. 1, 3.

National Debt Commissioners—Petition for re-Transfer of Stock—Dismissal of former Petition by same Petitioner—Res Judicata—Discovery of Fresh Evidence—National Debt Act, 1870 (33 & 34 *Vict. c.* 71), *ss.* 51, 54, 55.

The jurisdiction given to the Court by sect. 55 of the *National Debt Act*, 1870, to decide upon petition as to the validity of a claim for the re-transfer of stock, which has been transferred to the National Debt Commissioners under the provisions of sect. 51, is to be exercised in the mode in which the ordinary jurisdiction of the Court is exercised.

Therefore, if a petition for the re-transfer of stock is heard on its merits, and is dismissed on the ground that the Petitioner has failed to make out his title, he cannot, on the subsequent discovery of fresh evidence in support of his title, present a fresh petition for the same object, at any rate without the leave of the Court previously obtained.

PETITION.

This was a petition (presented in June, 1882) under the *National Debt Act*, 1870, and in the matter of the estate of *Elizabeth May* deceased, the widow and residuary legatee of *John May*, who died in 1775, for the transfer into the name of the Petitioner of a sum of £1155 2½ per Cent. Annuities, which had been transferred to the National Debt Commissioners in consequence of the dividends thereon having been unclaimed for a period of ten years. The Petitioner claimed to be one of the next of kin of *Elizabeth May*, and as such had obtained a grant of administration *de bonis non* to her estate.

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In the year 1867 the Petitioner had presented a similar petition for the same object under the Acts relating to unclaimed dividends then in force, for which the Act of 1870 was afterwards substituted. This petition came on for hearing before Lord *Romilly*, M.R., on the 27th of June, 1868, when an order was made directing an inquiry in Chambers "who is or are entitled" to the £1155 stock. The Chief Clerk, by his certificate, dated the 22nd of May, 1873, certified that no sufficient evidence had been produced before him to enable him to ascertain "who is or are entitled" to the stock in question, and that no sufficient evidence had been produced to shew that the *John May*, in whose name the stock had stood in the books of the *Bank of England*, was identical with the *John May* whose widow was the *Elizabeth May* under whom the Petitioner claimed. On the 1st of July, 1873, the Petitioner took out a summons to vary the Chief Clerk's certificate in accordance with exceptions taken to it by him. By these exceptions he alleged that the evidence which he had adduced clearly proved his title to the fund as the personal representative of *Elizabeth May;* that the certificate had exceeded the order, and that no inquiry had been directed regarding the identity of *John May;* and that that identity had been clearly proved by the evidence. The summons was heard with the further hearing of the petition by Sir *G. Jessel*, M.R., on the 24th of July, 1874, when an order was made overruling the exceptions, and dismissing the petition and the summons with costs.

The present petition contained an allegation that the Petitioner was in possession of further evidence in support of his claim. He had, however, not obtained any leave of the Court before presenting the second petition.

Lush-Wilson, for the Petitioner.

Stirling, for the Commissioners and the Attorney-General, took the preliminary objection that the matter had been disposed of by the decision on the former petition.

Lush-Wilson, for the Petitioner:—

There is no estoppel by record. This is a proceeding *in*

personam, not *in rem*. The former petition was dismissed only on the ground that there was not sufficient evidence of the identity of the *John May* through whom the Petitioner claims with the *John May* in whose name the stock stood. The Petitioner has now discovered further evidence of identity. The order dismissing the petition must be read in conjunction with the Chief Clerk's certificate, which shews what was the ground of dismissal. In order to ascertain the meaning of a decree or judgment you must look at the pleadings in the action in which it was made or pronounced: *Robinson* v. *Duleep Singh* (1). The case is analogous to that of a bastardy summons under the Act 7 & 8 Vict. c. 101, s. 2, in which case it has been held that the dismissal of a summons on the merits is not a bar to a renewed application for an affiliation order, the previous dismissal having been obtained by means of perjured evidence: *Reg.* v. *Gaunt* (2).

[PEARSON, J.:—There the mother of the child was claiming a right to receive continuous payments from the putative father; on applying for the first payment she did not prove her case; on applying for the second she did.]

This is not like an ordinary suit in Equity; the jurisdiction depends on the words of the Act. Under sect. 54 the Commissioners are really trustees for the Petitioner: they hold the stock which has been transferred to them "for the public, subject to the claims of the parties entitled thereto."

According to the old Common Law practice a judgment in an action of ejectment was not a bar to a fresh action. And, if the judgment in any action is consistent with new matter assigned, it would not be a bar to a new action founded on that new matter. There was no final judgment on the former petition. In *Goucher* v. *Clayton* (3) the defendant to an action for the infringement of a patent submitted to judgment against him. It appeared from the record that the validity of the patent was not put in issue, and it was held that, in a subsequent suit by the plaintiff against the defendant for a fresh infringement, the defendant was not estopped from contesting the validity of the patent.

(1) 11 Ch. D. 798.
(2) Law Rep. 2 Q. B. 466.
(3) 13 W. R. 336.

PEARSON, J. 1883 *In re* MAY.

[PEARSON, J.:—There the defendant submitted to judgment without any issues being tried.]

The case is an authority that a judgment is not *per se* conclusive, unless it appears that the issue which it is afterwards sought to raise was then definitely decided against the person who seeks to raise it. The dismissal of a bill in the Court of Chancery was a bar to a new bill by the same person only when the Court had thereby determined that he had no title to the relief sought by his bill: *Bainbrigge* v. *Baddeley* (1). There was no such determination on the former petition in the present case. At any rate, leave should be given to present a fresh petition.

Stirling, for the Commissioners and the Attorney-General:—

This is not a question of technical estoppel, but of the application of the broad general principle of all law, that, when a matter has been fully litigated between the parties on its merits, there is an end of it. The present petition offends against two well-known maxims, "*Nemo debet bis vexari pro eâdem causâ*," and "*Interest reipublicæ ut sit finis litium*": *Greathead* v. *Bromley* (2); *Marriott* v. *Hampton* (3); *Commings* v. *Heard* (4). In *Collier* v. *Walters* (5) it was held that a man was bound by a decree made in a suit to which he was not a proper party, but in which he raised a question of construction which was decided. When a matter is contested before the proper tribunal, and in the proper way, and is heard out on its merits, the judgment is conclusive until it is set aside, or reopened in some way which the law permits. It is no answer to say that the ground of the decision was the absence of evidence in support of the claim. This rule applies most strongly to the present case, in which the inquiry which was directed on the former petition was prosecuted in Chambers for four years, and the Petitioner had every opportunity of proving his case. A Judge of the High Court cannot now rehear a case after an order has been passed and entered: *In re St. Nazaire Company* (6).

Northmore Lawrence, for the legal personal representative of *Elizabeth May*.

(1) 2 Ph. 705, 710.
(2) 7 T. R. 455.
(3) Ibid. 269.
(4) Law Rep. 4 Q. B. 669.
(5) Ibid. 17 Eq. 252, 266.
(6) 12 Ch. D. 88.

Lush-Wilson, in reply:— PEARSON, J.

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Greathead v. *Bromley* (1) is in my favour. There Lord *Kenyon* said: "As it appears that all the facts now brought forward in the affidavit in support of the rule existed at the time of the former rule, and every objection which can now be urged might then have been brought forward, the matter must now be taken to have passed *in rem judicatam*, and the former decision is conclusive between the parties." In the present case new facts are now brought forward. *Marriott* v. *Hampton* (2) has no application. The former order does not on its face purport to be a final adjudication; it was in the nature of a nonsuit. *Reg.* v. *Gaunt* (3) is distinctly in point. The Chief Clerk's certificate is equivalent to the finding of a jury, and must be looked at in order to determine the meaning of the judgment. In *Langmead* v. *Maple* (4) Mr. Justice *Willes* said (5): "It is not sufficient to constitute *res judicata* that the matter has been determined on; it must appear that it was controverted as well as determined upon."

PEARSON, J.:—

This is a petition for a re-transfer to the Petitioner of certain stock which has been transferred to the Commissioners for the Reduction of the National Debt. A preliminary objection was taken to it, viz., that a petition by the same Petitioner in the same words and to the same effect had been disposed of in the year 1874 by the judgment of the late Master of the Rolls, Sir *George Jessel*. This was not denied, and I must take it that the petition upon which the order for inquiries of the 27th of June, 1868, and the order of dismissal of the 24th of July, 1874, were made, was substantially the same as the present petition. It was contended that the last order was not a final order, and that, therefore, it was possible to present a second petition for the same objects without the previous leave of the Court, and, as far as I understand it, the argument went to this extent, that, when one petition has been dismissed by reason of the claimant having

(1) 7 T. R. 455, 456.
(2) Ibid. 269.
(3) Law Rep. 2 Q. B. 466.
(4) 18 C. B. (N.S.) 255.
(5) 18 C. B. (N.S.) 270.

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failed to make out his title by the evidence which he has put in in support of his petition, he may, possibly *de anno in annum*, present successive petitions, if he can improve his evidence, so as eventually to get the fund which he claims. Now sect. 55 of the Act under which the present petition is presented, and which is in the same terms with the corresponding provision of the former Act, contains this proviso, "But in case the Governor or Deputy Governor of the *Bank of England* is not satisfied of the right of any person claiming to be entitled to any such stock or dividends, the claimant may, by petition in a summary way, state and verify his claim to the Court of Chancery. The petition shall be served on Her Majesty's Attorney-General and on the National Debt Commissioners, and the Court shall make such order thereon (either for re-transfer of the stock to which the petition relates and payment of the dividends accrued thereon or otherwise), and touching the costs of the application, as to the Court seems just." It is said that, by analogy to the procedure for obtaining a bastardy order, the Petitioner is not concluded by his failing upon one petition, but that it is the duty of the Court from time to time, as he may improve his evidence, to hear him again, and eventually, if he makes his evidence complete, to order the transfer of the stock to him. I am of opinion that the meaning of sect. 55 is that the jurisdiction of the Court under it is to be exercised in the ordinary way in which the Court exercises its jurisdiction, and that it was never intended to introduce with regard to these petitions a mode of procedure which is unknown and abhorrent to the practice of the Court of Chancery. Then it is said that the order on the former petition was in no sense a final order. The order made in June, 1868, was in the ordinary form, directing an inquiry who was or were entitled to the stock in question. Out of deference to what was said by Mr. *Lush-Wilson*, who argued the case very fairly and very strenuously on behalf of his client, I have looked at *Robinson* v. *Duleep Singh* (1) in order to see whether there is anything in that case which might lead me to think that my original impression in the present case was wrong. I find that that case simply decided, what really needed no decision at all,

(1) 11 Ch. D. 798.

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that, if a decree of the Court is capable of more than one construction, you must, in order to ascertain what is the proper construction, look at the pleadings in the action to discover what was the issue which the Court intended to decide. The issue on the present Petitioner's former petition was, whether he was or was not entitled to that for which he asked, viz., a transfer of the stock in question to him, and the order was made in the general form in which it was made because the Court has learned by experience that a man, who claims, for instance, as the sole next of kin of a deceased person, may eventually turn out to be only one of the next of kin, and, accordingly, instead of limiting the inquiry simply to the right of the Petitioner, the Court, in order to save expense and to decide the matter completely at once, directs an inquiry in these general terms—who is or are the persons entitled to the stock in question. The answer of the Chief Clerk in his certificate was, that no person had proved his claim. That was the first answer. The second answer was, that the evidence put in by the Petitioner was insufficient to prove his claim. I find that exceptions were taken to the Chief Clerk's certificate. I have not the exceptions before me, but it is perfectly plain that they must have been taken to those two findings. The first exception must have been that the Chief Clerk's certificate ought to have found that the Petitioner had proved his claim, and the second must have been that the finding that the evidence of the identity of *John May* was not sufficient ought to have been that it was sufficient. I am told that the order made on the hearing of these exceptions was not a final order as regards the proceedings on that petition. I think it was as final as any order well could be. There are two matters of practice which are too well settled in this Court for any one to dispute them. One is, that no Judge of first instance can re-hear a matter on which an order has been made by another Judge, or even by himself, after the order has been passed and entered. The other is, that, if, under any circumstances, it is right and proper that a matter which has been disposed of should be re-heard, a re-hearing can take place only upon leave being previously obtained from the Court, according to the regular forms and practice, upon its being shewn that there may have been at all events a miscarriage of justice on the occasion of the former

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hearing. That has not been done in the present case, and, therefore, I must, as a matter of course, dismiss this petition with costs.

I desire to make one other observation, and this without any reference whatever to the merits or demerits (whichever they may be) of the present case, for I know nothing of them. It is that this case belongs to a class in which, as was said in one of the cases cited to me by Mr. *Lush-Wilson*, the Court ought to be exceedingly suspicious of admitting further evidence after the length of time which has elapsed since the former petition was before the Court.

Solicitor for Petitioner: *B. Hope.*

Solicitors for Commissioners and Attorney-General: *Hare & Co.*

W. L. C.

PEARSON, J. 1883 *Dec.* 7.

TILLETT *v.* NIXON.

[1883 T. 1316.]

Foreclosure Action—Appointment of Receiver—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 19, *sub-s.* 3.

A legal mortgagee being in possession of the mortgaged property, applied to the Court for the appointment of a receiver:—

Held, that although the mortgagee might, under the *Conveyancing Act*, 1881, appoint a receiver without coming to the Court, it was more desirable, where an action was pending, that the appointment should be made by the Court under the *Judicature Act*, 1873.

THIS was an action for foreclosure of a mortgage by the first mortgagee in possession, who had the legal estate in the mortgaged property.

The mortgagor being unable to pay the interest, a motion was made on behalf of the mortgagee for the appointment of a named person, or some other fit and proper person, receiver of the rents and profits of the estate.

Thurstan Holland, in support of the motion:—

We are entitled under the *Judicature Act*, 1873, s. 25, sub-s. 8, to the appointment of a receiver though we are legal mortgagees;

and although we may be entitled to appoint a receiver under sect. 19, sub-sect. 3, of the *Conveyancing Act*, 1881, without application to the Court, that does not preclude us from coming to the Court for that purpose, and we prefer having a person appointed by the Court. It is submitted that in this case it is "just and convenient" that a receiver should now be appointed.

This was done in *Pease* v. *Fletcher* (1), and in *Truman* v. *Redgrave* (2) and *Cole* v. *Crust* (before Mr. Justice *North*, July 12, 1883).

St. John Clerke, for the mortgagor:—

The mortgagee is not justified in this case in coming to the Court for a receiver. When the mortgagor found himself unable to pay the interest, he went to the Plaintiff's solicitors voluntarily and put them in receipt of the rents of the property. He is now negotiating a new mortgage at a lower rate of interest for a sufficient sum to cover the Plaintiff's claim for principal, interest, and costs. If they were not satisfied, they might have appointed a receiver under the *Conveyancing Act*, but instead of that they incur the unnecessary expense of obtaining the appointment of a receiver by the Court. Although we cannot ask to stay proceedings in the suit, we submit that under the circumstances this motion is entirely unnecessary, and the mortgagor ought not to be ordered to pay the costs.

In *Cole* v. *Crust* there would have been considerable difficulty for the mortgagor to get in the rents of the property, but that difficulty does not occur here.

Dobbs, for the two mortgagees.

PEARSON, J.:—

I have always thought it a very hard case that a legal mortgagee under the old law had no right to come to the Court and ask for a receiver of the mortgaged property. Now, however, under the *Judicature Act* the Court is authorized to appoint one, where it could not previously have done so. I have no doubt the mortgagee might appoint a receiver under the *Conveyancing Act*

(1) 1 Ch. D. 273. (2) 18 Ch. D. 547.

PEARSON, J. 1883 TILLETT v. NIXON.

without coming to the Court, but when an action for foreclosure is pending, and the parties are at arm's length, it is much more desirable that the receiver should be appointed by the Court. If the mortgagor, however, wishes to have the nomination of the receiver made in Chambers, I cannot refuse to accede to the request.

The mortgagor not asking for a reference to Chambers,

THE COURT appointed the nominee of the mortgagee to be the receiver, and ordered the costs to be costs in the action.

Solicitors: *H. Dain; S. E. Lambert.*

T. W. G.

PEARSON, J. 1883 *Nov.* 17; *Dec.* 10.

In re CALTON'S WILL.

Practice—Business in Chambers in Chancery Division—Application for Payment out of Court—Money paid in under Lands Clauses Consolidation Act, 1845—*Sum under* £1000—*Rules of Supreme Court*, 1883, *Order* LV., *r.* 2, *sub-ss.* 2, 6, 7.

An application for the payment or transfer out of Court to a person absolutely entitled of a fund of less amount than £1000 paid into Court under the *Lands Clauses Act* is governed by sub-s. 2 of rule 2 of Order LV., and ought now to be made by summons in Chambers.

THIS was a petition for the sale of a sum of £458 11*s.* Consols, which was standing in Court to the credit of this matter, "*Ex parte* the Mayor, Aldermen, and Burgesses of the City and Borough of *Bath*," and for the division of the proceeds of sale among persons who had become absolutely entitled thereto. The fund had arisen from the investment under an order of the Court of the sum of £430, which had been paid into Court by the Corporation of *Bath* as the purchase-money of land which was taken by them in 1872, under the powers of a special Act passed in 1870, with which the *Lands Clauses Consolidation Act*, 1845, was incorporated. The order for investment directed also that the dividends on the Consols should be paid to the person who was tenant for life of the land. The tenant for life had recently died. The petition asked that the Corporation might be ordered to pay the costs of the petition.

Bissill, for the Petitioners.

Charlton Hawkins, for the Corporation, objected that under sub-sect. 2 of rule 2 of Order LV. (1), the application ought to have been made by summons in Chambers. The Corporation, therefore, ought to pay such costs only as would have been incurred by a summons in Chambers.

Bissill, for the Petitioners:—

Applications with respect to funds paid into Court under the *Lands Clauses Act* are governed by sub-sect. 7 of rule 2, not by sub-sect. 2. The omission from sub-sect. 7 of the words "payment out of Court," which occur in sub-sect. 6, shews that it was not intended that the mode of application for the payment out of moneys paid in under the *Lands Clauses Act* should be altered. Such an application, whatever be the amount of the fund, is still to be made by petition, as provided by the *Lands Clauses Act*.

PEARSON, J., was of opinion that the application was properly made by petition, and that the Corporation must pay the costs in the ordinary way.

Dec. 10. On taking his seat in Court this day,

PEARSON, J., referred to this case, and said:—At the moment when this petition was first brought before me, I thought the question whether the application should have been made by summons in Chambers was covered by a decision of Mr. Justice *Kay* early in

(1) Order LV., rule 2, provides that "The business to be disposed of in Chambers by Judges of the Chancery Division, shall consist of the following matters, in addition to the matters which under any other rule or by statute may be disposed of in Chambers (*inter alia*):

"(2.) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where the cash does not exceed £1000, or the securities do not exceed £1000 nominal value.

"(6.) Applications under 9 & 10 Vict. c. 20 (the *Parliamentary Deposits Act*) for investment, payment of dividends, and payment out of Court.

"(7.) Applications for interim and permanent investment, and for payment of dividends under the *Lands Clauses Consolidation Act*, 1845, and any other Act passed before the 14th of August, 1855, whereby the purchase-money of any property sold is directed to be paid into Court."

PEARSON, J. 1883 *In re* CALTON'S WILL.

the present sittings, and I said I should follow that decision, and allow the Petitioners only such costs as would have been incurred if the application had been made by summons. Later in the day I was told by the Petitioners' counsel that I was mistaken in supposing that Mr. Justice *Kay* had decided the point, and then, after looking at rule 2 of Order LV., rather hurriedly, I came to the conclusion that the case was not within sub-sect. 2, and that such an application ought still to be made by petition. Soon afterwards another application of the same kind was brought before me by one of my chief clerks, who told me that similar applications were constantly being made in Chambers, and asked my direction as to whether they could properly be made by summons. I then looked at the rule again, and it appeared to me that there was more difficulty in its construction than I had thought when the point was first mentioned to me in Court, and, finding that there was an application by summons then pending before my Chief Clerk for the payment out of £700 which had been paid into Court under the *Lands Clauses Act*, I desired that it should be adjourned for hearing before me in Court, in order that the point might be fully argued. For some reason which I do not know that case has not yet come into the list, and in the meantime Mr. Justice *Chitty* has, after argument in Court, decided the very same question in *In re Maidstone and Ashford Railway Company* (1), and has held that the application should be made by summons in Chambers. He has spoken to me about it, and he tells me that Mr. Justice *Kay* takes the same view, or at any rate intends to act on the same principle. I am still inclined to the opinion which I originally expressed. It is, however, of very little consequence whether I am right or wrong in my view, but it is of the utmost importance that the practice in all the Chambers should be the same. I, therefore, now give notice that I withdraw my original opinion, and I shall direct my chief clerks that in future they are to deal with such applications on summons in Chambers, and I shall not be able to allow the extra costs of a petition.

Solicitors: *Young, Jones, Roberts, & Hale; Clarke, Woodcock, & Ryland.*

(1) *Ante*, p. 168.

W. L. C.

In re BURGESS.
BURGESS *v.* BOTTOMLEY.

[1883 B. 2222.]

C. A.
1883
Nov. 9.

Practice—Next Friend of Infant.

Doubts having arisen as to the proper custody of an infant, a suit was commenced in her name for the administration of her father's estate. A next friend was appointed who was a friend of the Defendants, the executors and trustees of the will, and guardians of the infant, and accepted the office at their request, and on an indemnity from their father. The solicitors on the record for the Plaintiff were the solicitors of the executors. On an application in the name of the infant by *M.*, the husband of her paternal aunt, as next friend *pro hâc vice*, to remove the next friend and substitute *M.* :—

Held, reversing the decision of *Bacon*, V.C., that although nothing was alleged against the character, circumstances, or conduct of the next friend, his connection with the executors made him an improper person to act as next friend, and that he ought to be removed and *M.* substituted.

THOMAS BURGESS by will, dated the 26th of July, 1873, appointed his mother, since deceased, and the Defendants, *Thomas Bottomley* and *Joseph Bottomley*, trustees and executors thereof, and guardians of his infant children, and gave his residuary estate to his trustees and executors upon trust to pay his wife an annuity of £300 during widowhood, and in case of her marrying again an annuity of £100 during her life, and subject thereto upon trust for such of his children as being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry. He died in September, 1873, leaving three children, two of whom died infants and unmarried before 1878. The widow married again in 1880, and died in January, 1883. The Plaintiff, a girl, born in 1872, was the testator's only surviving child, and lived with her mother and stepfather till the death of the mother. Disputes then arose as to her custody. Her paternal aunt, Mrs. *Maile*, wife of *C. E. D. Maile*, wished that the child should live with her, and the stepfather wished that she should remain with him. It appearing certain that proceedings would be taken to make her a ward of Court, a Mr. *Smith*, at the request of the executors and trustees, as next friend of the infant,

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caused an action to be commenced in the name of the infant, against the surviving executors and trustees for administration of the testator's estate, and on the 28th of April judgment was given for carrying into execution the trusts of the will.

On the 3rd of May, 1883, an order was made appointing *Thomas Ormerod* next friend of the Plaintiff in the place of *Smith*, the original next friend.

On the 5th of May a summons was taken out on behalf of the Plaintiff by *C. E. D. Maile*, as her next friend for the purpose of the application, to have Mr. *Ormerod* removed from being next friend, and to have Mr. *Maile* or some other proper person substituted.

It was not alleged that Mr. *Ormerod* had in any way misconducted himself, and it was not disputed that he was a respectable person in a good position. The case made for his removal was that he was a friend of the Defendants, and was acting only at the request of the Defendants or their solicitors, who were also solicitors on the record for the Plaintiff. Mr. *Ormerod* himself in his affidavit stated that he had been asked by Mr. *James Bottomley*, the father of the Defendants, to allow his name to be used as next friend, that he had replied that he must be guaranteed against any expense, and that Mr. *Bottomley* had given him a guarantee to that effect.

The summons was adjourned into Court, and was dismissed by Vice-Chancellor *Bacon*, who considered that as nothing was alleged against the character, position, solvency, or conduct of the next friend, there was no ground for displacing him. Mr. *Maile* in the name of the Plaintiff appealed.

Marten, Q.C., and *Ingle Joyce*, for the appeal;—

There ought to be an independent next friend, who will, if and when necessary, support the interest of the infant Plaintiff as against the accounting parties. The present next friend is merely their nominee, and the infant has no more protection than if one of them was next friend.

Hemming, Q.C., and *J. G. Wood*, *contrà*:—

It has been common for friendly suits for administration to be instituted where it is desirable to make the infant a ward of

Court, and for the same solicitor to act for all parties, and there are cases where it has been said by the Court that it is not only proper but the duty of trustees to get friendly suits instituted. If next friends are to be removed on such grounds as are alleged here it will be necessary for all suits on behalf of an infant to be hostile suits.

COTTON, L.J.:—Mr. *Marten*, we propose to substitute Mr. *Maile* as next friend, and to make your costs here and below costs in the action. We further propose that Mr. *Ormerod* should not pay any costs, but that he should not have any costs of the proceedings, either here or below, on this motion. If you are not satisfied with such an order you will be heard in reply.

Marten stated that he should be satisfied with the proposed order.

COTTON, L.J.:—

This is an appeal from a decision of Vice-Chancellor *Bacon* in a suit to administer the estate of *Thomas Burgess*, in which an application was made to him to substitute Mr. *Maile* as next friend for Mr. *Ormerod* who was the next friend of the Plaintiff in that action. The Vice-Chancellor refused the application. It was contended that his decision was right, for that Mr. *Ormerod* had done nothing which would justify his being removed from his position as next friend. But we must not only consider whether he has done anything which would justify the Court in removing him, we must also consider his connection with the Defendants who are the trustees and executors of the testator, *Thomas Burgess*. The question is whether, having regard to this connection, he is a fit person to have the conduct of the suit committed to him. It is not alleged that he has in the conduct of this suit done any act of misfeasance for which he ought to be removed. But it is a settled principle that a party ought not to be both plaintiff and defendant. Mr. *Thomas Ormerod* no doubt is a respectable gentleman who intends to do what is right, but he is put in by the trustees and executors. On being put in by them he gets an indemnity from their father. I do not think that is itself material,

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but it shews how completely he is connected with them, and he leaves the matter entirely to his solicitor who is acting for the executors. There ought not to be either in form or substance the same person both plaintiff and defendant; there ought to be some person acting independently as plaintiff against the defendant. Mr. *Maile* is the husband of a lady who is a near relation of the Plaintiff, and that being so, there is no objection to his being next friend. I think, therefore, that Mr. *Ormerod* is not a proper person having regard to all the circumstances of the case to be the next friend, and that Mr. *Maile* ought to be substituted. It would not be right to make Mr. *Ormerod* pay any costs of the application here or below, but on the other hand I do not see how we can saddle the estate of the infant with them. I think, therefore, that we ought to make no order as to Mr. *Ormerod's* costs of the application here or below, but the costs of the Appellant here and below will be costs in the action.

LINDLEY, L.J.:—

I am of the same opinion. I do not concur on the ground that Mr. *Ormerod* has misconducted himself. There is no evidence of that, nor is it alleged that he has done so, and I hope he will understand that there is no slur upon him in the order that we make. It is an old established practice and a proper one that a defendant shall not be next friend to an infant plaintiff. Mr. *Ormerod* is in substance, though not in form, one of the Defendants; he is connected with and appointed by them, and is not in a position, and is not in the least likely, to look after the interests of the infant if they should conflict with the interests of the executors. I do not know whether they will conflict or not, but if they do it is obvious he cannot look after the interest of the infant in the way in which an independent person would. For that reason only it appears to me that he ought never to have been appointed next friend, and the facts being brought to our attention, we do not think it right that he should continue to occupy that position.

Solicitors for Appellant: *Kingsford, Dorman, & Co.*
Solicitors for Respondent: *Flower & Nussey.*

H. C. J.

In re PICKERING.
PICKERING *v.* PICKERING.

[1880 P. 39.]

C. A.
1883
Nov. 13.

Practice—Production of Documents—Sealing up Entries—Partnership Books—Surviving Partner.

The Defendant and *W. P.* were partners. *W. P.* died and appointed the Defendant his executor. In an action by a person interested under *W. P.'s* will against the Defendant a decree was made for administration of *W. P.'s* estate, and for taking accounts of the partnership as between the Defendant as surviving partner and *W. P.'s* estate. An order having been made for the production of the partnership books by the Defendant, he claimed to seal up such entries as related to his own private affairs:—

Held (affirming the decision of *Chitty*, J.), that inasmuch as the Plaintiff and Defendant were both interested in the partnership property, the Defendant was not entitled to the ordinary power to seal up such entries as he might swear to be irrelevant to the matters at issue in the action, but only to seal up entries which related to certain specified private matters mentioned in the order.

JOHN PICKERING and *W. Pickering* were in partnership. *W. Pickering* died on the 30th of November, 1875, having by his will appointed *John Pickering* and two other persons his executors, and made his two children his residuary legatees.

The present action was brought by one of the testator's children against the executors, and he obtained the ordinary judgment for the administration of the testator's estate, and a supplementary order for taking the accounts of the partnership as between *John Pickering* and the testator's estate.

The Plaintiff having applied for discovery of documents in the possession of the Defendants, the Defendant *John Pickering* made two affidavits as to documents, on which he was cross-examined. The Plaintiff not being satisfied with the affidavits on the 10th of May, 1883, moved that *John Pickering* should file a further affidavit of all the books and documents relating to the affairs of the partnership formerly subsisting between himself and the testator, and for an order to inspect the same.

The reasons for this application were as follows: *John Pickering*

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had only included some of the partnership books and documents in his former affidavits, and it appeared from his cross-examination that he considered the others immaterial on the ground that they related to matters preceding an alleged settlement of account. The Defendant also alleged that some of the letters and copies of letters which were contained in the partnership books related to his own private affairs, and were unconnected with the partnership. Among other things there were letters relating to a sum of £3000, arising from an undertaking called the *Vigo Railway*, which the Defendant alleged to belong to himself, but the Plaintiff claimed to be partnership property.

There were also other entries and letters relating to certain trust properties referred to as "the *Tredwell* estate," and "*P. S. Fletcher's* marriage settlement."

Mr. Justice *Chitty*, before whom the application was made, made an order for the affidavit required, and ordered an inspection of the partnership books and documents, "except such parts, if any, as the Defendant *J. Pickering* may by such affidavit object to produce on the ground that they relate exclusively to two private trust accounts called respectively 'the *Tredwell* estate' and '*P. S. Fletcher's* marriage settlement,' or that they are letters written by *J. Pickering* to his medical man."

The Defendant *J. Pickering* appealed from this order.

Ince, Q.C., and *MacSwinney*, for the Appellant:—

There is no reason why the common form of order should not be adhered to in this case. The rule of the Court is that the oath of the producing party must be believed; he swears that some of the letters and entries in the partnership books relate to his private affairs and not to partnership matters, and he claims to be allowed to seal them up. In particular he claims to seal up letters to his private friends, solicitors, and bankers, in addition to letters and entries relating to the trust estates mentioned in the order.

Romer, Q.C., and *Tyssen*, for the Plaintiff:—

This is not an ordinary case of production of the Defendant's documents. The documents here are not exclusively the

documents of the Defendant. He is the executor of *W. Pickering*, and therefore the Plaintiff is his *cestui que trust*, and has a right to all the information which the Defendant has. There is no independent person representing the testator's estate as against the surviving partner, and it is essential that the Plaintiff should be able to judge for himself whether the letters and other entries relate to the partnership property or not. No doubt as a general rule the oath of the producing party is conclusive, but here the Defendant has shewn by his previous affidavits that he misunderstands the nature of his rights, and he cannot be left to decide what things are material to the issues between us and what are not.

Ince, in reply.

COTTON, L.J.:—

This is an appeal by *John Pickering* from an order of Mr. Justice *Chitty*, respecting the production of documents which have been scheduled by him. He says that the order restricts the liberty to which he is entitled of sealing up portions of the books which are not relevant to the action. The only real question is, whether he ought to be at liberty to seal up some portion of the letters entered in the letter books of the partnership. The common form of the order gives the party producing his books liberty to seal up such entries as he swears do not relate to the matters in dispute in the action. But in the present case, as between the Plaintiff and Defendant, these books are not the books of the Defendant, but the books of the partnership, in which the Plaintiff as well as the executors of the deceased partner and the surviving partner has an interest. The question is, then, whether the common form of order would be the right one in this case, and I am of opinion it would not be. The letters which the Defendant wishes to seal up are in the partnership books, for which reason there is a strong presumption that they relate to partnership matters, therefore I think the common form would not be applicable to his case. It is suggested by the Defendant that he sometimes entered letters in the partnership books which did not relate to partnership affairs. Therefore the

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question is whether certain things in the partnership books were transactions in which the Defendant was individually interested or partnership matters. In my opinion the person ordered to produce the books ought not to be at liberty to seal up letters which *primâ facie* relate to the partnership, unless the affidavit states the nature of the transactions, and shews that they do not relate to partnership business. Now what liberty does the order appealed from give? It gives him leave to seal up "such parts, if any, as the Defendant, *J. Pickering*, may by such affidavit object to produce on the ground that they relate exclusively to two private accounts, called respectively 'The *Tredwell* estate,' and '*P. S. Fletcher's* marriage settlement,' or that they are letters written by *J. Pickering* to his medical man." That specially provides for sealing up letters relating to certain special matters which are not partnership matters. But he asks for something more: he asks for liberty to protect letters to his private friends, to his solicitor, and to his bankers. I do not think he is entitled to have this liberty. His letters to his private friends may well relate to matters which the Plaintiff claims to be partnership matters. And the same may be said of letters to his solicitor and his bankers. In my opinion the order is in the correct form, and the appeal must be dismissed with costs.

LINDLEY, L.J.:—

I am of the same opinion. This is not an ordinary application. The Defendant stands in a peculiar position. The Plaintiff is a beneficiary under the will of a deceased partner, and the Defendant is the surviving partner and also the executor of the deceased partner. He says I will not produce to my *cestui que trust* entries in the partnership books, because I have entered certain matters and certain correspondence which do not relate to the partnership. We must look at the question reasonably. Where the subject of the entries can be so described as to shew that they do not relate to the partnership affairs, he has liberty to exclude them. But when it comes to such entries as those which relate to profit and loss it is not right that the Defendant should be trusted to decide whether they relate to the partnership or not. If we could invent any form of words which would exactly

describe what entries ought to be protected we would do so; but as that is impossible, the only way, as it seems to me, is to make the Defendant swear as to each particular item that he wishes to protect, what the subject of it is, and whether it relates to the partnership affairs. I agree that the appeal fails, and that the Appellant must pay the costs.

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Solicitors: *Soames, Edwards, & Jones; Llewellyn, Ackrill, & Raw.*

M. W.

In re POTTERIES, SHREWSBURY, AND NORTH WALES RAILWAY COMPANY.

C. A. 1883 Nov. 15.

Railway Company—Abandonment—Application of Parliamentary Deposit—Landowner—Diminution of Value of Land—Measure of Damages.

A railway company being about to apply for an Act of Parliament for making an extension line, assented to *F.*, an owner of land over which the line was intended to pass, commencing the line over his own land. *F.* accordingly made an embankment over his land, and was paid for the work by the company. After a considerable part of the work on *F.*'s land had been done the company obtained their Act giving power to construct the railway in the proposed line. The Act contained a proviso that if the new line were not opened for traffic within five years the parliamentary deposit should be applied towards compensating landowners or other persons whose land had been interfered with or rendered less valuable "by the commencement, construction, or abandonment of the railway." The extension railway was not completed within five years, but no warrant of abandonment was obtained under the *Railways Abandonment Act.* A fresh Act was passed authorizing a petition for winding up the company and the sale of the undertaking by the official liquidator.

A petition having been presented by *F.*'s mortgagees and the trustee in his liquidation for the application of the parliamentary deposit in compensation for the injury done to his estate by the commencement, construction, or abandonment of the works:—

Held, that the undertaking was abandoned within the meaning of the Act;

That the words "commencement, construction, or abandonment," must be read disjunctively;

That *F.*, having commenced the works on his own land before the company had obtained their Act, on the speculation that they would obtain power to construct the railway, the petitioners had no claim for compensa-

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tion for injury to the estate by the commencement or construction of the railway; but they had a claim for compensation for injury done by the abandonment of the railway;

That the measure of injury must be determined by comparing the value of the estate immediately before with its value immediately after the abandonment.

Whether the words "commencement of the railway" must be confined to its commencement by the company under its parliamentary powers, or would include its commencement in anticipation of such powers, *quære*.

Held, also, that mortgagees of the landowner might be persons entitled to claim compensation under the Act.

THE *Potteries, Shrewsbury, and North Wales Railway Company* in the year 1873 were desirous of constructing an extension railway; and in order to raise the necessary funds for that purpose they entered into an agreement with the *London Financial Association*, dated the 6th of August, 1873, under which it was agreed that the works should be at once commenced. Part of the extension line was intended to be constructed over lands belonging to Mr. *R. S. France*, who was possessed of certain quarries of limestone and other minerals at *Nantmawr*, in *Shropshire*. Mr. *France* accordingly in the autumn of 1873 commenced constructing an embankment across his own land on the line on which the railway was intended to run. This was done with the sanction or acquiescence of the company, and the works were superintended by their engineer, and Mr. *France* was paid by the company sums of money on account of the cost of construction.

The bill authorizing the construction of the extension railway was introduced into Parliament in the session of 1874. The company transferred into the Court of Chancery a deposit of £2573 13*s.* 6*d.* Consols in pursuance of the Standing Orders. The bill was not opposed, and received the royal assent on the 21st of May, 1874, the short title being the *Potteries, Shrewsbury, and North Wales Railway Act*, 1874 (37 Vict. c. vi.). At the date of the bill receiving the royal assent considerable progress had been made by Mr. *France* with the construction of the embankment, but a portion was done after the passing of the Act. By the Act the company was authorized to form two lines of railway, one of which was in the line of the embankment made by Mr. *France*.

All the works done by Mr. *France* were within the limits of deviation laid down in the deposited plans, but the works were not alluded to in the Act.

Section 22, after reciting the payment of the deposit of £2573 13*s.* 6*d.*, proceeded as follows:—

"Be it enacted that, notwithstanding anything contained in the said Act, the said stock so transferred as aforesaid in respect of the application for this Act shall not be paid or transferred to or on the application of the person or persons, or the majority of the persons named in the warrant or order issued in pursuance of the said Act, or the survivor or survivors of them, unless the company shall previously to the expiration of the period limited by this Act for completion of the railway either open the railway for the public conveyance of passengers, or prove to the satisfaction of the Board of Trade that the company have paid up one-half of the amount of the capital by this Act authorized to be raised by means of shares, and have expended for the purposes of this Act a sum equal in amount to such one-half of the said capital; and if the said period shall expire before the company shall either have opened the railway for the public conveyance of passengers, or have given such proof as aforesaid to the satisfaction of the Board of Trade, the said stock transferred as aforesaid shall be applied in the manner hereinafter specified, and the certificate of the Board of Trade that such proof has been given to their satisfaction as aforesaid shall be sufficient evidence of the fact so certified, and it shall not be necessary to produce any certificate of this Act having passed, anything in the above-mentioned Act to the contrary notwithstanding."

Sect. 23: "The said stock transferred as aforesaid shall be applicable, and, after due notice in the *London Gazette*, shall be applied, towards compensating any landowners or other persons whose property may have been interfered with, or otherwise rendered less valuable by the commencement, construction, or abandonment of the railway, or any portion thereof, or who may have been subjected to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act, and for which injury or loss no compensation, or inadequate compensation, shall have been paid, and shall be

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distributed in satisfaction of such compensation as aforesaid, in such manner and in such proportions as to the Court of Chancery in *England* may seem fit, and if no such compensation shall be payable, or if a portion of the said sum of money shall have been found sufficient to satisfy all just claims in respect of such compensation, then the said stock, or such portion thereof as may not be required as aforesaid, shall either be forfeited to Her Majesty, and accordingly be paid or transferred to or for the account of Her Majesty's Exchequer in such manner as the Court of Chancery in *England* thinks fit to order, on the application of the solicitor of Her Majesty's Treasury, and shall be carried to and form part of the Consolidated Fund of the *United Kingdom;* or, in the discretion of the Court, if the company is insolvent and has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver, or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof. Provided that until the said stock has been re-paid or re-transferred to the depositors, or has become otherwise applicable as hereinbefore mentioned, any interest or dividends accruing thereon shall from time to time, and as often as the same shall become payable, be paid to or applied on the application of the person or persons named, or the majority of the persons named in such warrant or order as aforesaid, or the survivors or survivor of them."

The 24th section provided that if the railway was not completed within five years the powers thereby granted to the company for the making of the railway should cease, except so much thereof as might be then completed.

The railway was never completed, and early in 1881 the company gave notice to Mr. *France* not to go on with the embankment. On the 18th of July, 1881, an Act was passed entitled the *Potteries, Shrewsbury, and North Wales Railway Winding-up Act*, 1881, by which the company was authorized to present a petition for winding up, and it was enacted that the liquidator who should be appointed in the winding-up should offer the undertaking with the parliamentary powers for sale to any railway company in manner to be approved by the Court.

In pursuance of this Act a winding-up order was made on the 21st of April, 1882, and an official liquidator appointed.

On the 5th of March, 1873, Mr. *France* mortgaged his interest in part of the land and quarries to *W. Blackmore*, whose personal representative was *H. P. Blackmore*.

On the 17th of September, 1880, Mr. *France* mortgaged his interest in the remainder of the land and quarries to *F. E. Lewis*.

On the 4th of April 1881, Mr. *France* filed a petition for liquidation, and *L. H. Elkington* was appointed the trustee of his estate.

In consequence of the abandonment of the undertaking, Mr. *France* had to make a private railway for the use of his quarries. He also complained that the embankment which had been made blocked up a road which led to his quarries.

A petition was now presented by *L. H. Elkington*, *H. P. Blackmore*, and *F. E. Lewis*, praying that the Petitioners should be compensated out of the deposit of £2573 13*s.* 6*d.* consols for any injury or loss which might be found to have accrued to them by reason of the commencement, construction, or abandonment of the extension railway.

As the petition was first drawn it stated that the company "intended to abandon" the undertaking, no formal proceedings having been taken under the *Railways Abandonment Acts*. The petition was heard by Mr. Justice *Kay*, on the 13th of February, 1882, when His Lordship held that no compensation could be granted for the expected abandonment of the railway, and that no injury had been done to the Petitioners by the company in its commencement and construction, and dismissed the petition with costs.

The Petitioners appealed from this decision. The petition came on before the Court of Appeal on the 3rd of April, 1883, when the Court ordered it to stand over for the petition to be amended, and it was then amended by inserting an allegation that the railway had been abandoned, and in other particulars.

The petition as amended now came on to be heard.

Whitehorne, Q.C., and *Willis Bund*, for the Appellants:—

The undertaking has been abandoned within the meaning of

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the 23rd section of the *Potteries, Shrewsbury and North Wales Railway Act*, 1874, and the Petitioners are entitled to compensation for the loss of value to their land caused by such abandonment. The shareholders have no interest in this money. The only persons who can claim it are the creditors and the landowners injured by the construction or abandonment of the undertaking: *In re Bradford Tramways Company* (1); *Re Lowestoft Tramways Company* (2). The Respondents contend that the works were done by Mr. *France* himself on his own land; but they were done with the sanction of the company and under the direction of their engineer with a view to the proposed extension, and were in fact paid for out of the company's money. It was a mere accident that they were done by the landowner himself. The works were in conformity with the compulsory powers of the Act, though part was done before the Act passed. Real injury has been done to the value of the land by making the embankment, and in particular by stopping up an old road leading to the quarry. The measure of damage is the difference between the value of the land just before the abandonment, that is, with the prospect of the railway being opened and serviceable, and its present value.

Beale, for the official liquidator of the company:—

The works in this case were not done by the company but by the landowner himself. The greater part was done before the Act passed. The conclusion from the evidence is that they were done by *France* to further his own objects, the company acquiescing. He is not a meritorious creditor within the meaning of the Act. If he is held entitled to damages, it will be competent to a landowner to do works or erect buildings on mere speculation, because he expects a railway to be made, and then to claim damages if it is abandoned. At all events, in ascertaining the measure of damage the original value of the land before the commencement of the works must be considered and not their value just before the abandonment.

The Petitioners are mortgagees; they are not landowners within the intention of the Act. The trustee in liquidation has no substantial interest in the property.

(1) 4 Ch. D. 18. (2) 6 Ch. D. 484.

Stirling, for the Crown :—

The undertaking has not yet been abandoned. It has been sold to another company who have obtained power to continue it.

J. Kaye, for the nominees of the promoters who transferred the deposit into Court.

Whitehorne, in reply.

Cotton, L.J. :—

This is an appeal from an order made by Mr. Justice *Kay* dismissing with costs the petition of the Appellants, which petition asked to have an inquiry under the *Potteries, Shrewsbury and North Wales Railway Company's Act*, 1874, as to compensation which ought to be paid to them out of the fund required to be paid into Court by Parliament when this Act was granted. The petition comes before us in a very different state from that in which it was when it was before Mr. Justice *Kay*, because there, as I understand, the case made was that the railway company intended to abandon their railway. That had not been done, and on the ground that there had been no abandonment Mr. Justice *Kay* dismissed the petition. Now the petition having been amended the case is put in a different way. This fund was a sum of £2573 13*s.* 6*d.* Consols which was required by Parliament to be transferred into Court. The Act was for making an extension of an existing railway, and the provision as regards this fund (sect. 22) was that unless the company should previous to the expiration of the period limited for completing the railway, either open the railway for public conveyance, or prove to the satisfaction of the Board of Trade certain things to have been done, which have not been done, then the fund was to be distributed as thereinafter mentioned. The first provision in the next section (the 23rd) was for the benefit of the landowners, and that directed that the money should be applied towards compensating any landowners or other persons whose property might have been interfered with or otherwise rendered less valuable "by the commencement, construction, or abandonment of the railway or any portion thereof." There are other persons to be compensated, namely, those whose

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property has been interfered with by the company under the compulsory powers given by the Act, and after all those are compensated, if there is a surplus, it is to go to other persons; but we have only really to consider the claims of the present Petitioners.

Undoubtedly, in our opinion, this railway has been abandoned, but that is not the event on which the right of the Court to deal with the fund arises. But it is material in considering the claims of the Petitioners to compensation to see whether the railway has been abandoned. Shortly after the Act was passed, the company directed Mr. *France*, who was, under circumstances which I shall have to consider, making an embankment, which was to be part of the new railway, not to go on any further. They have since got an Act of Parliament under which they have been wound up, and there are no means by which this company can now raise the capital. It is said that they have never raised a single sixpence. Nothing has been done except that which was done by Mr. *France* towards the construction of the railway, and in our opinion it has clearly been abandoned.

But it was said that the Act to wind up the company enabled the liquidator to sell and transfer the existing railway under the powers granted by the Act of 1874, with which we are dealing, and it was said that the power of making the railway was thus continued beyond the time limited by the Act, and therefore it cannot be said that there is any abandonment. But, in my opinion, there is no extension of time. The purchasers of the powers given by that Act, if they went before Parliament for an extension of time or for anything else, might get some benefit from the fact of the purchase; but, in my opinion, the mere fact that the liquidator was to sell these powers does not amount to a statutory enactment that the time limited for the completion of the railway and for the exercise of the powers for the construction of the railway, limited precisely to five years by the Act of 1874, should be extended. If the time is extended indefinitely it might go on for ever. In my opinion that argument cannot prevail, and we must hold that there has been an abandonment.

Now I come to the question to what compensation the Petitioners are entitled. They are in a somewhat curious position. Some of them are mortgagees, and one of them is the trustee in

liquidation of *France*, who was the contractor by whom the works on the land in which the Petitioners are interested were done. The Petitioners are mortgagees and owners of the equity of redemption. They are certainly landowners or persons having property which comes to some extent within the Act of Parliament. Now it has occurred to me that, so far as they were mortgagees, they could not claim for compensation unless it was shewn that their security was deficient, so that they wanted this money or compensation for the benefit of making good to them their mortgage money. That case was not really raised by the Respondents, and I do not feel called upon to say, as against the Petitioners, that there is anything which prevents us from holding that they have a right to come under this clause of the Act, and to get an inquiry as to their damages.

This clause of the Act of Parliament is not very clear. To entitle a person to come and ask for compensation his property must have been rendered less valuable "by the commencement, construction, or abandonment of the railway or any portion thereof." In my opinion that is disjunctive. It refers to three things: commencement may injure, construction may injure, or abandonment may injure—that is to say, render the land less valuable—and if either of those three things disjunctively, or if they all together, have rendered the property less valuable, then the parties are entitled to compensation. But the more material question which was argued was this: in considering how far the property has been rendered less valuable by the abandonment of the railway, when is the comparison of values to be made? Is it to be a comparison with the value existing at the time when the Act was passed or when the railway was commenced; or is it to be the loss of the value existing at the time of the abandonment by the fact of abandonment? I think the proper construction is, that the loss must be estimated as at the time when the act which causes the loss occurs; at the time of the commencement, if it is caused by the commencement, at the time of construction, if it is caused by any particular act of construction, or at the time of the abandonment, if the real depreciation in the value of the property is caused by the abandonment.

It will be necessary here, of course, to have an inquiry under

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the Act to see what persons there are, other than the Petitioners, who have suffered loss in the value of their property, and who are entitled to compensation, and that must be a general inquiry in the words of the Act; but, as regards the Petitioners, as the case has been argued before us, I think we ought to say on what principle they are entitled to compensation.

Now, as regards the commencement, can it be said here that they are entitled to claim any compensation in respect of the deterioration caused by the commencement of the railway." I think there would be great difficulty as regards Mr. *France* himself if he were here. It was said that he had made this embankment himself, and therefore neither he nor his mortgagees could claim compensation in respect of any injury caused by it; and it was further said that the commencement of the work, that is to say, the embankment which exists, was not the work of the company, and, consequently, that on the construction of the Act, there could be no claim by anybody.

I will take the second point first. Here it is not necessary to decide it, having regard to the view which I take of the first objection against *France* and his mortgagees. The identical works authorized by the Act, though not under the authority of the Act, had been commenced and have caused injury. I do not favour the view that it is necessary that the commencement should have been by the company, because, when Parliament authorizes a company to form a railway in a particular line and according to certain plans, and there are existing on that line works already formed which will be utilized, and must be utilized, if the railway is formed, for the purposes of the railway, it may well be that Parliament requires the company to come under this obligation to all the landowners, that if the railway is not completed, then the money deposited should be compensation not only for injury caused by the works of the company, but for the injury caused by the works existing at the time the Act was passed, which works, if the company performed their promise to Parliament, and completed their railway, would be, not an injury but a benefit to the landowner by being a part of the completed railway. But we do not decide that here, because, in my opinion, it is not necessary in consequence of the way this embankment

was made. It really was made by Mr. *France* as a matter of speculation, principally for his benefit and for the benefit of his own property, but as between him and the company, in the hope and expectation that the railway company would get power to complete this railway, and that if they got that power the embankment would assist in the completion of the line then to be authorized. Neither he nor his trustee can claim compensation for injury caused by works done by him. As regards those mortgagees who came into existence as mortgagees after he had done these acts, and also, I think, as regards mortgagees whose mortgages were created before, but who left *France* in the possession of the property to do what he liked on his own land, I think no claim could be made in consequence only of loss sustained by the commencement of the works.

As regards abandonment it is very different. In my opinion the landowner is entitled to compensation for the loss in the value of his property by the abandonment. That, I say, must mean depreciation or loss of the value existing immediately before the abandonment, and caused by the abandonment; and I think here the question of the effect caused on the value of the property by the commencement of this embankment would not be material, because, in estimating the depreciation in the value caused by the abandonment, there was very properly taken into consideration the fact that the abandonment not only left the land in its natural state simply depreciated in value by the abandonment of this undertaking, which undertaking probably had increased its market value by that time, but also left this embankment there, which must be an incumbrance instead of being what it would have been if the railway had been completed—a benefit as forming part of the completed railway. In my opinion, in considering whether the property has been rendered less valuable you must take into account what was the fair value of this property existing immediately before the abandonment, and then see what was its value immediately afterwards, the difference, of course, being the depreciation in value, the amount by which the property has been rendered less valuable.

So much as regards the Petitioners. There will be a declaration of the opinion of the Court that the Petitioners, or some

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of them (it is not necessary to define carefully which of the Petitioners), are entitled to say they have suffered loss—that in reference to the mortgagees may be a question hereafter; and there will be an inquiry as to landowners in the district. The order will be in the form which has been sketched out by Lord Justice *Fry*, as follows: "It appearing to the Court that the Petitioners, or some of them, are persons whose property has been rendered less valuable by the abandonment of the railway authorized by the Act of 1874, for which no compensation has been paid, inquire what landowners and other persons there are whose property has been interfered with or otherwise rendered less valuable by the commencement, construction, or abandonment of the railway or any portion thereof." Then there will be the second inquiry whether any, and, if any, what compensation has been paid in respect of such interference or diminution in value; thirdly, what sums will make compensation for such interference or diminution of value respectively. Then, of course, further consideration of the petition must be reserved.

The only other question is that of costs. We are of opinion that the petition, as presented to Mr. Justice *Kay*, was properly dismissed. Here we have an entirely different petition before the Court, and the Petitioners were wrong until the petition was amended, which was some time after the petition had been before the Court of Appeal. Therefore, we do not in any way disturb the order made by Mr. Justice *Kay* as regards the costs of the petition before him. We discharge his order, but order the Petitioners to pay the costs of the petition in the Court below, and the costs of the petition up to the time when it was amended. Then, as regards the Petitioners' further costs, those must be reserved until the matter is finally disposed of. As regards the other persons who have appeared here, we think we cannot give any of them costs except those that they will get on the petition before it was amended, and they must bear their own subsequent costs. There will be no other order as to costs.

LINDLEY, L.J.:—

I think the construction which has been put upon the Act by Lord Justice *Cotton* is the correct one; but I confess it is very

difficult to work out this 23rd section in any way which is perfectly clear and satisfactory, so that one may feel certain that one has got to the right construction beyond all dispute. In the first place, the deposit is not large, nor is it ever very large; and, in the next place, it is obvious that some kind of surplus is contemplated in the generality of instances; and I suppose that every landowner would say that his land has been increased in value by the passing of the Act and diminished in value by the abandonment of the railway. If that is so he would be claiming compensation, and the possibility of an ultimate surplus coming to any one else seems somewhat shadowy. But we must deal with the language as best we can. I do not propose to say anything except upon two points. I am not satisfied that "commencement" necessarily means commencement by the railway company, for the reason Lord Justice *Cotton* has given. I do not think we are driven to decide that. My own opinion at present is, that commencement means simply commencement, and that is the language used. As regards abandonment, I cannot help feeling that the only safe course is to adhere closely to the words. That compels us to compare the value at two different times, and the Act does not tell us what the two times are; but the language is "rendered less valuable by the abandonment," and I cannot construe that in any other way than that you must look at the value of the land before the abandonment, and at the value of the land after the abandonment, and if the difference is caused by the abandonment, that is a diminution in value by the abandonment. I do not see how else to construe it. I see certain difficulties in working out the matter, but with those observations I have nothing more to add, except that I quite agree in the result at which Lord Justice *Cotton* has arrived.

FRY, L.J.:—

I also come to the same conclusion, and I agree with Lord Justice *Lindley* that the clause is one not free from difficulty. The clause is shortly this: that the money in question shall be applied "towards compensating the landowners or other persons whose property may have been interfered with or otherwise rendered less valuable by the commencement, construction, or

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abandonment of the railway or any portion thereof, or who may have been subject to injury or loss in consequence of the compulsory powers of taking property conferred upon the company by this Act." Now, pausing there, it is obvious, to my mind, that the class of persons intended to be benefited is much larger than the class of persons who would be entitled to compensation under the *Lands Clauses Act* or the *Railways Clauses Consolidation Act*, and therefore it appears to me that we have nothing to guide us as to the class of persons except the very words of the section, and the scope and intention of the section. Now the general scope and intention of the section I take to be to give some security to everybody who is injured by the commencement, construction, or abandonment of the railway. The first inquiry is this. Has Mr. *France*, or have the persons who claim under him and who are Petitioners here, been injured by the commencement of the line? Now the facts which bear upon it are these: that *France* thought fit to place upon his own land a quantity of refuse from his own quarry; he did that, no doubt, in the expectation that this line would be formed; but it appears to me he did it at a time before the passing of the Act which conferred legal sanction upon the company, and that, therefore, it was a purely voluntary act on his part. But was he injured by the commencement of the railway? I take the putting of the bank on his own land to be the commencement of the railway. Was his land rendered less valuable by it? In the first place, I have no evidence before me which satisfies me that the land was rendered less valuable. I rather suppose from the evidence that if he had sold it immediately after putting that heap upon it he would have sold it for more than before putting the heap upon it, because it was expected at the time that the railway would be made. Again, I am inclined to think—although after the expression to the contrary by the other Lords Justices I have great doubt whether I am right—that the commencement must be by the company; but I agree that is a point needless now to determine. I think that under the circumstances here stated it is plain that *France* can claim no compensation for the acts which he himself has done on his own land. But there arises a second question, which is this, was the value of his land rendered

less by the abandonment of the railway? Now, although the evidence is not very satisfactory, I have come distinctly to the conclusion that it was rendered less valuable by the abandonment of the railway. The argument on the other side is this. It is said if you leave out the increase of value due to the passing of the Act, there will be no diminution in the value of the land. It appears to me that is not the mode of construction. I am unable to find any periods which are to be brought into comparison with regard to the value of the property except the periods immediately before and immediately after the happening of the events which give rise to the right. Now take the three cases. The land, we will assume, is rendered less valuable by the commencement. We are to compare the value of the land at two times. What are those two times? It appears to me that the two times are immediately before and immediately after the commencement. In the same way, supposing an act of construction renders the land less valuable, how are you to compute the diminution of value? I know of no periods at which to take the comparison except the periods immediately before and immediately after the act of construction is done. So, with regard to abandonment, I think you must look at the value immediately before the railway is abandoned and immediately afterwards; if you see that the land is less in value at the second than at the first period, by reason of the abandonment, then I think a case has arisen which gives a claim under the Act. If those are not the two periods, what are the two periods? It is said you must take the value of the land at the passing of the Act, but at the time when the Queen's consent is given the land has in all probability acquired its increased value, because we all know that the royal assent to an Act of this description is almost a matter of course. Are you then to take the value of the land before the petition for the Bill was presented, or at what time? No time has been definitely presented to us which is to my mind at all satisfactory. I think, therefore, although the point is not without difficulty, that the ascertainment of the diminution in value is to be made by the comparison of values immediately before and immediately after the happening of the events referred to in the Act as commencement, construction, and abandonment. I think,

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therefore, that the Petitioners have made out their case in the present instance, and are entitled to the judgment which has already been given.

Kaye asked for a declaration that the persons named in the warrant were entitled to the dividends on the deposit until the expiration of the five years limited by the Act.

COTTON, L.J.:—We think you are entitled to the dividends accrued up to the expiration of the five years.

Solicitors: *Paddison, Son, & Co.*, agents for *Ratcliff, Birmingham; Markby, Stewart, & Co.; The Solicitor to the Treasury.*

M. W.

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Ex parte STRAWBRIDGE. *In re* HICKMAN.

Bankruptcy — Composition or Scheme of Settlement of Bankrupt's Affairs—Approval of Court—Notice of Meeting of Creditors—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 28—*Trustee—Costs.*

Under sect. 28 of the *Bankruptcy Act*, 1869, the Court is not bound to approve of resolutions passed by the creditors of a bankrupt authorizing the trustee to accept a composition, or assent to a general scheme of settlement of the bankrupt's affairs, even if it sees that the majority have been acting *bonâ fide* in the interest of the creditors, and that better terms cannot be obtained for the creditors.

It is the duty of the Court to look at all the circumstances, and to have regard to the moral aspect of the case, and not to give its approval to the proposed arrangement, although it may be for the benefit of the creditors, if it can see that the money which they are to receive under it is to be paid in order to hush up and prevent investigation into some discreditable transaction.

The trustee in a bankruptcy applied to the County Court for its approval of a composition offered by the bankrupt and sanctioned by resolutions passed by the creditors under sect. 28. The Judge refused to give his approval. The trustee appealed to the Chief Judge, who held that the approval of the Court ought to be given. On the application of dissentient creditors the Court of Appeal restored the order of the County Court Judge:—

Held, that the trustee was entitled to apply to the County Court, but

that he ought not to have appealed. Consequently, though he was allowed out of the bankrupt's estate his costs of the application to the County Court, he was ordered to pay personally the costs of both appeals.

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THIS was an appeal from a decision of *Bacon*, C.J.

William Hickman carried on business as a chemist at *Bridgwater*. In November, 1882, he was indebted to Messrs. *Strawbridge & Jones*, stockbrokers in *London*, in the sum of £185 11*s.* 3*d.* for brokerage and commission, and money paid at his request for differences on the *Stock Exchange*. They were pressing him for payment, and on the 10th of November Mr. *S. Chapman*, his solicitor, wrote to them by his instructions, and told them (*inter alia*), "if you press him I am afraid you would compel him either to sell his business or seek relief in bankruptcy." *Strawbridge & Jones* placed the matter in the hands of their solicitors. They on the 21st of November, served *Hickman* with particulars of demand in bankruptcy, and on the same day they issued a writ against him in the Queen's Bench Division for the amount of the debt. On the 29th of November, *Chapman* entered an appearance for him in this action. Immediately after the issue of the writ in this action, *Chapman*, acting on behalf of *Hickman's* father, issued a writ against *Hickman* for a sum of £1001 15*s.*, which he owed his father for advances made to him. No appearance was entered in this action, and on the 30th of November judgment was signed on behalf of the father for £1006 1*s.*, debt and costs. A writ of *elegit* was at once issued, under which *Hickman's* goods were seized, and his book debts were also attached on behalf of the father. *Strawbridge & Jones* signed judgment in their action on the 6th of December. They issued a debtor's summons against *Hickman*, with which he failed to comply, and on the 30th of December, 1882, they presented a bankruptcy petition against him in the *Bridgwater* County Court, founded on the act of bankruptcy thus committed, and on the 10th of January, 1883, he was adjudicated a bankrupt. The first meeting of the creditors was held on the 29th of January, when the bailiff of the Court, who had been previously, at the instance of *Strawbridge & Jones*, appointed receiver, was appointed trustee, with a committee of inspection, consisting of a clerk in the employment of *Chapman* and a creditor named *Hooper*, who

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was a friend of *Hickman*, and who had nominated *Chapman* as his proxy. *Chapman* was appointed solicitor to the trustee. The bankrupt's statement of affairs shewed that he owed to unsecured creditors the sum of £1144 1*s.* 6*d.*, and that his assets amounted to £34, which consisted of £24, estimated surplus of securities in the hands of creditors holding security, and £10 the estimated value of a policy for £250 on the bankrupt's life.

On the 29th of March, 1883, a general meeting of the creditors was held in pursuance of a notice given by the trustee on the 19th of March. This notice stated that the meeting would be held at the office of *Chapman*, to consider the assent by the trustee to a scheme of settlement of the affairs of the bankrupt, and for annulling thereafter the order of adjudication.

The only persons present at this meeting were *Chapman*, who held proxies for the bankrupt's father, and for some other creditors, and *Hooper*, who was present on his own behalf. The following resolutions were passed:—

"That the trustee be authorized to accept the following scheme of settlement of the affairs of the bankrupt offered on his behalf.

"(1.) That the taxed costs of the petitioning creditors of the proceedings in the bankruptcy be paid on the approval of the said resolutions by the Court.

"(2.) That a composition of 2*s.* 6*d.* in the pound be paid and accepted, within one month of such approval, in satisfaction of the debts due to the creditors from the bankrupt.

"(3.) That the trustee's costs of the bankruptcy be paid.

"(4.) That the above-mentioned payments are to be made on condition that the order of adjudication be annulled, and that the order annulling the same is to be made on the certificate of the trustee that such payments have been made."

The total number of creditors was thirty-three, of these fifteen assented to the resolutions, including seven whose respective debts were under £10. The debts of the fifteen creditors amounted altogether to £764 6*s.* 4*d.*, of which the debt due to the father was £496 10*s.*, this being the sum for which he had proved, after giving credit for the value of the goods which he had seized under his *elegit*, and of the book debts which he

had attached. The debts due to the other fourteen assenting creditors amounted to £267 16*s.* 4*d.* The total amount due to creditors who had proved, but who did not assent to the resolutions, was £305 19*s.* 7*d.* This included the sum of £266 1*s.* 8*d.* for which *Strawbridge & Jones* had proved. The amount due to creditors who had not proved was £73 15*s.* 7*d.* The trustee applied to the County Court for an order approving of and giving effect to the resolutions. The application was opposed by *Strawbridge & Jones*, and the judge dismissed it, with costs to be paid by the trustee. The trustee appealed to the Chief Judge.

The appeal was heard on the 9th of July, 1883.

Winslow, Q.C., and *J. A. G. Hamilton*, for the Appellant:—

The amount of a sum offered by way of composition as a sole guiding principle is misleading; although as one of the guiding principles it is most valuable: *Ex parte Hudson* (1), followed by *Ex parte Russell* (2).

The real secret is, that these *Stock Exchange* creditors are determined to keep this man a bankrupt. The only other creditors are favourable to the composition.

The trustee is the bailiff of the County Court.

[BACON, C.J.:—Is that a disqualification? He is more likely to hold an even hand.]

H. T. Eve, for the Respondents:—

The facts as they stand are sufficient to support the order. But there are other facts—for example, that the bankrupt represented himself to be in a good position, and able to pay his differences.

[BACON, C.J.:—What have I to do with that?]

The learned Judge's judgment was that the whole thing was done out of compassion to the bankrupt, and not in the interest of creditors. We had offered him easy terms; but his answer was that he intended to become bankrupt unless we accepted his terms.

The notice of the meeting said that it was to be held for the adoption of a scheme of arrangement, whereas the resolutions

(1) 22 Ch. D. 773. (2) 22 Ch. D. 778.

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passed were only for a composition. Thus we were misled, and might have prevented the passing of the resolutions had we known the real object of the meeting.

BACON, C.J.:—

I cannot properly on this occasion go into the topic as to how these debts were contracted, or whether they were lawfully incurred or not, because the opposing creditors have proved for a certain liquidated amount of debt, and that proof is not sought to be disturbed. Hence all considerations as to the imprudence of the bankrupt's conduct I discard altogether as having nothing to do with the question before me, which is, whether this order of the County Court is to be supported or not.

The learned Judge has gone with almost microscopic minuteness into the circumstances of the case, and has proceeded on the principle that, if resolutions can be shewn to have been merely sympathetic, and clearly not passed in the interest of the creditors, they cannot be permitted.

I confess that with regard to this supposed principle, sympathy seems to me to be entirely out of the question. The sympathy of a father with his son is a law of nature; and so in every day experience, in the course of any bankruptcy, any friend of the bankrupt must feel some sympathy with him,—a feeling which he is at liberty to indulge, provided he does not injure anybody by so doing.

Here is an estate consisting of nothing, and the proposal is, that all the costs of the trustee shall be paid, and that 2*s.* 6*d.* in the pound shall be paid to every creditor who has proved in the bankruptcy; and, upon condition that these promises are fulfilled, the adjudication is to be annulled. What ground have I for saying that all the creditors, including those other than the opposing creditors, will take no benefit from those resolutions? Is there any hope of the estate yielding anything more?

The learned Judge has, as I have said, stated the facts with extreme care, and has weighed the interests of the parties with scrupulous exactness. He finds that everybody at the meeting assented to the resolutions. I say everybody, because those creditors who now oppose were not present, but stayed away

voluntarily. Against the father's credit not a word has been said—his responsibility has not been impeached—and nobody has suggested that, if this composition of 2*s.* 6*d.* be rejected, any creditor will get five farthings from any quarter. It has been put forward as a ground of suspicion that these resolutions were prepared at a solicitor's office—but it is matter of necessity that solicitors should act in these matters. So that when all these *nihils* are put into the scale, I find that they weigh nothing altogether.

I think that the resolutions ought to be registered; and accordingly I discharge the order of the County Court. I approve and confirm the resolutions and direct them to be carried into effect; but I cannot give the Appellant any costs.

J. B. D.

From this decision Messrs. *Strawbridge & Jones* appealed.

The appeal was heard on the 16th of November, 1883.

Cooper Willis, Q.C., and *H. T. Eve*, for the Appellants:—

These resolutions were not passed in the interest of the creditors; the only result of them will be to prevent proceedings being taken to set aside the transactions between the debtor and his father just before the bankruptcy as a fraudulent preference, and to obtain for the creditors the property which the father has seized.

Then, the notice of the meeting was not a good notice under sect. 28 (1); it did not state truly the object of the meeting. The arrangement proposed was not a scheme of settlement of the affairs of the bankrupt, as stated in the notice, but a composition, which is a totally different thing. A general scheme of settle-

(1) Sect. 28 provides that, "The trustee may, with the sanction of a special resolution of the creditors assembled at any meeting of which notice has been given specifying the object of such meeting, accept any composition offered by the bankrupt, or assent to any general scheme of settlement of the affairs of the bankrupt, upon such terms as may be thought expedient, and with or without a condition that the order of adjudication is to be annulled, subject, nevertheless, to the approval of the Court, to be testified by the Judge of the Court signing the instrument containing the terms of such composition or scheme, or embodying such terms in an order of the Court."

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ment would not oust the trustee from his rights as to the bankrupt's property: *Ex parte Wainwright* (1). In any case payment of the costs would be essential, so that the addition of that provision does not make the arrangement anything more than a composition. The Court ought to disregard the directions of the creditors when it can see that they have voted with the intention of favouring the debtor or persons whom he is alleged to have fraudulently preferred: *Ex parte Cocks* (2). Under sect. 28 the Court is to look at all the circumstances of the case, and it may decline to approve the resolutions, even if there has been no fraud in the proceedings: *Ex parte Merchant Banking Company of London* (3). We ought to have an opportunity of investigating the suspicious transactions between the bankrupt and his father.

Winslow, Q.C., and *J. A. G. Hamilton*, for the trustee:—

The question is whether the composition offered is for the benefit of the creditors; that is the only question which the Court ought to consider. It will not inquire into motives. If the estate could only pay 2*s.* 6*d.* in the pound, and somebody offered to pay the creditors 5*s.* in the pound, from whatever motive, the creditors would be justified in accepting the offer, and the Court would exercise its discretion by approving their resolutions. The application for the approval of the Court was made by the trustee in the performance of his duty; he could not do otherwise, and he ought not to have been ordered to pay costs personally. The composition offered was a fair one, having regard to the amount of the assets: *Ex parte Hudson* (4); *Ex parte Russell* (5).

[COTTON, L.J.:—Those were cases of composition under sect. 126.]

The principle is the same. No doubt there are things to be considered under sect. 28, which would not have to be considered under sect. 126; but, if the question is whether the resolutions have been passed in good faith for the benefit of the creditors,

(1) 19 Ch. D. 140.
(2) 21 Ch. D. 397.
(3) 16 Ch. D. 623.
(4) 22 Ch. D. 773.
(5) 22 Ch. D. 778.

the same principles apply to both sections. The only question argued before the County Court Judge was whether the resolutions had been passed in the interest of the creditors, or for the sole benefit of the bankrupt. No *mala fides* is alleged; it is only said that certain transactions ought to be investigated. But the Appellants had a period of three months in which they might have taken steps to obtain such an investigation, and they did nothing. A composition of 2*s.* 6*d.* is a substantial offer, and it ought not to be set aside unless a prospect of something better is shewn.

As to the objection to the notice of the meeting, there is nothing in it. Suppose the notice had stated that a composition would be proposed, without mentioning the amount, and at the meeting a composition of 1*s.* in the pound had been offered, it might equally well have been objected that the notice ought to have stated the amount which it was intended to propose. A scheme of settlement might have included the purchase of the estate from the trustee, either for a lump sum, or for so much in the pound upon the debts. If a lump sum was mentioned, it would be liable to diminution by the costs of the bankruptcy, and a creditor could not tell from the notice what those costs would amount to. There is nothing to shew that any creditor was deceived by the notice, which was sufficient to indicate what was going to be done.

[COTTON, L.J.:—Ought the trustee to have been ordered to pay costs?]

Cooper Willis, in reply:—

The Court has a discretion as to costs. Before making the application the trustee should have obtained from the creditors an indemnity against costs.

COTTON, L.J.:—

This is an appeal from an order of the Chief Judge approving, under sect. 28, of certain resolutions passed by the creditors of Mr. *Hickman*, and reversing the decision of the County Court Judge at *Bridgwater*, who had refused to give his approval to the resolutions.

We do not know fully the reasons given by the Chief Judge,

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though I think the short note of his judgment which has been read to us by the junior counsel for the Respondent states the reasons sufficiently to enable us to understand what they were.

I regret to say that we are unable to agree with the learned Chief Judge in approving of these resolutions. The resolutions were passed under sect. 28, under which section the trustee may, with the sanction of a special resolution of the creditors, accept any composition offered by the bankrupt, or assent to any general scheme for the settlement of his affairs, "subject, nevertheless, to the approval of the Court." Under that section it is not that the Court is to set aside the resolutions of the creditors by refusing to register them, if it thinks that the power given to the creditors has not been duly exercised by them, but the Court is to give its approval before the resolutions can have any effect. It is very different from the power given to the creditors under sects. 125 and 126, where the Registrar is bound to register the resolutions, unless it appears that the powers given to the creditors have not been followed in form, or, if followed in form, have been followed in form only, not in substance, the creditors having acted with a view to some indirect or collateral object. The powers given to the creditors by those sections must be exercised fairly for the benefit of the creditors, and not with the view of favouring the debtor. But under sect. 28 the matter is entirely different. The Court is to judge for itself whether the resolutions are such as it ought to approve, and, in my opinion, (even although the creditors have done that which may possibly, in their opinion, give them a larger dividend), if the Court thinks that the true object of the resolutions was to gloss over and prevent an investigation of transactions which were not creditable,—possibly fraudulent—then, in my opinion, the Court ought not to give its approval. Now these resolutions, which were, shortly, to accept a composition of 2*s.* 6*d.* in the pound, were opposed mainly by the Appellants, who were creditors for £266, and they were approved by creditors whose debts amounted to a much larger sum, which included, however, about £496 due to the debtor's father. The debts of the other assenting creditors, independently of the father, amounted to about the same as, or were a little more than, the sum due to those who opposed. There is this to be said, that,

apparently, all those creditors who approved of the resolutions (the father certainly) were acting under the advice of a solicitor who was solicitor for the father as well as for the debtor. At the meeting at which the resolutions were passed this solicitor held a large number of proxies, and Mr. *Hooper*, who was a client of his, was also present. Now, that being so, this at once occurs to me: If there were any suspicious transactions between the debtor and his father, and if Mr. *Chapman* had acted as the solicitor of the father or of the son in those transactions, is it possible to come to the conclusion that the assenting creditors, independently of the father, could have been duly advised as to the nature of those transactions? I do not, however, found my judgment at all upon that. But Messrs. *Strawbridge & Jones* were creditors, and they were pressing the debtor for payment, and they were told by Mr. *Chapman* that, if they pressed him, the debtor would have to seek relief in bankruptcy. Bankruptcy, therefore, was plainly in the debtor's mind at the time. Then they brought an action against him. Immediately afterwards an action was brought against the debtor for the debt due to his father. In the action of the Appellants an appearance was entered for the debtor; in the other action no appearance was entered, and then proceedings were taken by means of which at present the father has got the whole of the property and stock-in-trade of the debtor, amounting in value to something like £1000, into his possession. It is impossible to say that that is a transaction which does not require investigation. It is not now brought before us to decide whether that was or was not a fraudulent preference of the father, but clearly bankruptcy was then in the contemplation of the debtor, and the circumstances are such as at least to raise very grave suspicions. It would seem on these facts that these resolutions, passed in the way which I have mentioned by creditors who were advised by and who put themselves in the hands of Mr. *Chapman*, were intended to draw a veil over what had taken place. And, although I do not intend to decide this case on the objection which has been taken as to the notice of the meeting, yet, as the Act does make a distinction between a composition and a general scheme of settlement of the bankrupt's affairs, and the form of notice (No. 55 in the Forms of 1870) also

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draws the same distinction, it is, to my mind, not immaterial that the notice of the meeting by which these resolutions were passed did not state that a composition was to be proposed, but that the meeting was called to consider a scheme of settlement of the bankrupt's affairs. That certainly aids the view that the whole of this transaction was intended to enable the bankrupt and his father to draw off the attention of the creditors and to hide these transactions. It may not be so; but I have said before, and I say it again, that, when creditors are attempting to exercise the very large powers given them by the *Bankruptcy Act* to bind a dissentient minority, everything ought to be fair and above-board, and every information ought to be given which can enable the creditors who do not attend the meeting to judge of what is intended to be proposed at it.

In my opinion, these resolutions, even though they may give the creditors a larger sum than they would get by investigating these transactions, ought not to receive the approval of the Court, as I cannot but have the conviction that the result of them will be to hide the truth of the transactions between the father and the son which took place immediately before the bankruptcy.

Then comes the question of costs. The County Court Judge ordered the trustee to pay the costs. That decision was reversed by the Chief Judge. Now what we think is this, that the trustee was justified in bringing the matter before the County Court Judge, and therefore, if there are any assets, he will have out of the estate his costs of applying to the County Court Judge for the purpose of obtaining his approval of the resolutions. But he was not satisfied with the decision of the County Court Judge, and appealed to the Chief Judge. In our opinion, he ought not to have appealed, and he must pay all the costs subsequent to the proceedings before the County Court; that is, the costs of this appeal and the costs before the Chief Judge.

LINDLEY, L.J.:—

I am of the same opinion. I regret not knowing more fully the reasons which influenced the Chief Judge in taking a different view of this transaction. One does not like to differ

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from a man without knowing the reasons which influenced him. But, looking at the matter *de novo*, and from every point of view which has been presented to us by both sides, the way in which it strikes me is this. This is an application for the approval of the Court to resolutions passed by creditors. What is the Court to do? Is it to approve the resolutions, simply because the creditors have approved them? That cannot be what the section means. The section throws upon the Court the duty of considering, not only the resolutions, but all the circumstances of the case. If for any reason the Court sees that the resolution is not one which ought to be approved, that it is tricky or fraudulent, or in any way discreditable; it is, in my judgment, the duty of the Court to decline to approve it. The County Court Judge took that view, and I am bound to say I think it is the correct view. I quite sympathise with the father of this debtor. It is very natural for a father to do what he can to screen his son from the consequences of *Stock Exchange* gambling. But, when we come to look at the way in which this debtor's assets have been dealt with, and when we see that the whole object has been, from beginning to end, to secure for the bankrupt the benefit of his business, to take it away from the creditors, and put it in the hands of his father, giving them 2*s.* 6*d.* in the pound,—when that is patent, it follows at once that the Court ought not to approve of such a resolution. This is the substance of the thing,—a scheme for enabling the son to continue his business, the father paying the creditors 2*s.* 6*d.* in the pound. If the bankruptcy is allowed to go on, there is a strong probability that other property of the bankrupt will be forthcoming.

As to the technical point relating to the notice of the meeting, I do not wish to say more than this, that I should be very sorry to hold the objection fatal if the transaction was honest. The Act draws a distinction between a composition and a scheme of settlement. It is tolerably plain that the two things may run closely into each other, and it may be very difficult to say whether a particular proposition amounts only to a composition, or is a scheme of settlement. I should be sorry to say that, in a case of that kind, where it was difficult to distinguish between the two, a notice in either form would not suffice. To my mind,

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the notice in the present case was intended rather to mislead than not. It is an ingredient in the case, and it throws light upon the real nature of the transaction.

FRY, L.J.:—

I agree in the conclusions of my learned Brethren and in the reasons which they have given. There is only one point on which I desire to add anything. It has been argued that under sect. 28 the approval of the Court must be given to the resolutions, provided that the creditors have exercised their discretion *bonâ fide*, and the Court does not think that better terms can be obtained for the creditors than those which appear in the resolutions. I do not think that that is the principle, at any rate the sole principle, upon which the Court should proceed. I think that it is bound to look at all the circumstances of the case. I think that it is bound to look at the moral aspect of the case, and is not bound to approve of an arrangement simply because it is the most beneficial for the pecuniary interest of the creditors. If the Court can see that the money which is to be paid to the creditors under the proposed arrangement is to be paid by way of hush money for a discreditable transaction, it ought to refuse to give its approval. I do not say that is so here. I only express my opinion on sect. 28, because of the argument which has been addressed to us.

Solicitors for Appellants: *Blair & W. B. Girling*, agents for *C. B. Bond, Wellington, Somerset.*

Solicitor for Respondent: *W. A. Boyle*, agent for *S. Chapman, Bridgwater.*

W. L. C.

In re INDERWICK.

C. A. 1883 Nov. 22.

Solicitor—Taxation of Bill—Ex parte Order—Special Agreement—Non-professional Work—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict.* c. 44), s. 8.

Where an agreement has been made for the remuneration of a solicitor and the solicitor alleges that the remuneration was for non-professional work, the person chargeable cannot obtain the common *ex parte* order for the delivery and taxation of the bill of costs. The *Solicitors' Remuneration Act*, 1881, s. 8, has made no difference in the practice in this respect.

In November, 1881, Mr. *P. R. Brewis* instructed his solicitor, Mr. *Rees Davies*, to obtain an advance of money for him on the security of a share under his father's will. Mr. *Davies*, being unable to procure it in consequence of the stipulations which Mr. *Brewis* insisted on as to the investigation of the title, introduced him to Mr. *A. Inderwick*, a solicitor carrying on business in *Bedford Row*, who offered to negotiate a loan of £2000 on the terms of receiving as remuneration a sum of 100 guineas, out of which he was to pay the costs of the mortgagee's solicitors and all other expenses, except the costs of Mr. *Davies* as the mortgagor's solicitor. The loan was completed on the 30th of January, 1882, Mr. *Inderwick* receiving the money from the mortgagee's solicitors and paying it to Mr. *Brewis*, after deducting therefrom £100. On that occasion Mr. *Brewis* and Mr. *Inderwick* signed an account shewing his receipts and payments, including £105 as "Agreed charge for loan, including disbursements and procuration fee," and shewing a balance of £5 due to *Inderwick*.

In May, 1883, Mr. *Brewis*, who had changed his solicitor, presented a petition for taxation in the Court of Mr. Justice *Chitty*, in which he stated that Mr. *Inderwick* had sent in a cash account to Mr. *Rees Davies* of payments made and received by him in respect of the said loan, and that he had therein claimed to deduct the sum of £105 for his costs as mortgagee's solicitor and for his fees, and claimed a balance of £5. On this petition an order was made *ex parte* that Mr. *Inderwick* should deliver a bill of costs to the

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Petitioner of all fees, charges, and disbursements claimed by him and comprised in the said sum of £105, and an account of all fees, charges, and disbursements claimed to be due to him from the Petitioner, and of all his receipts and payments on account of the Petitioner, and that the same might be referred to the Taxing Master for taxation.

On the 6th of August, 1883, Mr. *Inderwick* applied to the Court to discharge this *ex parte* order as having been irregularly obtained, but Mr. Justice *Chitty* refused the application.

Mr. *Inderwick* appealed from this decision.

Ince, Q.C., and *Dauney*, for the Appellant:—

Mr. Justice *Chitty* proceeded on the view that *Inderwick* was the solicitor to the mortgagee, but he was not. His statement is that he agreed to find the money for a lump sum as a procuration fee, and he obtained the loan, but in no sense did he act as the solicitor to the lender. If this be so, there can be no taxation of his charge. The relation of solicitor and client being denied, *Brewis* was not entitled to obtain the *ex parte* order.

Romer, Q.C., and *Cordery*, for *Brewis*:—

Assuming that there was a special agreement between *Brewis* and the Appellant, the work done was within the ordinary duties of a solicitor, and *Brewis* employed the Appellant because he was a solicitor; therefore he has a right to have the work taxed: *In re Newman* (1); *Allen* v. *Aldridge* (2); *In re Angove* (3); *Philby* v. *Hazle* (4). With respect to the regularity of the order the case comes within the *Solicitors' Remuneration Act*, 1881, s. 8, sub-s. 4. The intention of the Legislature was that where there was a special agreement like this it should no longer be necessary to get a special order to go to the Taxing Master, but the person chargeable should go first to the Taxing Master and then take the decision of the Judge as to the agreement when the certificate of the Taxing Master has been obtained.

Ince, in reply, as to costs.

(1) 30 Beav. 196.
(2) 5 Beav. 401.
(3) 46 L. T. 280.
(4) 8 C. B. (N.S.) 647.

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COTTON, L.J. :—

This is an appeal from a decision of Mr. Justice *Chitty*, refusing to discharge an order which had been obtained *ex parte* for the taxation of a solicitor's bill of costs. The order was the common order, but not quite in the common form. It was in the form of an order for the solicitor to deliver his bill for taxation, and it ordered him to deliver a bill of costs to the Petitioner "of all fees, charges, and disbursements claimed by him and comprised in the said sum of £105." If the Petitioner had no right to obtain a common *ex parte* order to tax under the circumstances which had occurred, this order cannot stand.

It appears that the Petitioner wanted an advance of money under special circumstances. He had an interest under his father's will, and he did not wish his family to hear of the advance. Mr. *Inderwick* was a solicitor, and he made an agreement with the Petitioner that he should obtain an advance for him and that he was to receive 100 guineas for his services. He says this was a procuration fee, that the terms required by the Petitioner for the advance were unusual, and that Mr. *Inderwick* was to pay all the costs of the mortgagee's solicitor, but he was not to receive the 100 guineas as a reward for his services as a solicitor but as a procuration fee for finding the money. A serious question arises between him and the Petitioner whether this fee was remuneration for work done as a solicitor or as work done by him not professionally as a solicitor. In my opinion, independently of the *Solicitors' Remuneration Act*, 1881, the common order for taxation ought not to have been obtained in this case. If Mr. *Inderwick* had been unquestionably acting as a solicitor, the common order would have been right, but he denies that the remuneration was for professional work, and therefore that question must be decided before an order can be obtained to tax the bill as for solicitor's work. That question has always been held sufficient to prevent a petitioner from obtaining the common order for taxation.

But it is said that the Act of 1881 makes a difference. In my opinion it makes no difference. Section 8, sub-sect. 4, of that Act says, that if under any order for taxation of costs an agreement relating to remuneration is relied on by the solicitor and objected

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to by the client, the Taxing Master is to certify the facts to the Court. But that supposes that the order for taxation has been obtained, and here it could not be obtained, because the work done is alleged to have been done independently of the professional work of a solicitor.

I feel no doubt that Mr. Justice *Chitty* was wrong in refusing to discharge the order, and that the appeal must succeed. I have had some doubts as to the costs, but having regard to the incorrectness of the statements in the petition, I have come to the conclusion that the Petitioner ought to pay the costs both here and below.

LINDLEY, L.J.:—

I desire to say nothing as to the rights of the parties in this case. But the Petitioner ought not to have obtained the common order for taxation. His object, probably, was to prevent the solicitor from raising the point which he has raised. But that point had been raised before the petition was presented, and I think the question ought to have been decided before the order for taxation was made. I also think that the statements in the petition are very incorrect, and therefore that the appeal must be allowed with costs.

FRY, L.J.:—

I am of the same opinion. According to the practice before the Act of 1881 the common order could not be obtained where a special agreement was alleged, and there was also a question whether the relation of solicitor and client existed. If that relation did exist, the fact of there being an agreement did not prevent the common order from being made. This is clearly laid down by Lord *Selborne* in *Ward* v. *Lawson* (1). But it is contended that the 8th section of the Act of 1881 makes a difference, and it is said that, where there is an agreement, the whole matter ought to be at once relegated to the Taxing Master. In my opinion that section makes no difference, and leaves the practice as it was before in this respect.

But independently of this, I think the order cannot stand.

(1) Law Rep. 8 Ch. 65.

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The statements in the petition are very incorrect. It alleges that £105 was deducted by Mr. *Inderwick* for his costs as mortgagee's solicitor, and for his fees. It was nothing of the sort. It was deducted as an agreed charge; and it was not deducted as his costs as mortgagee's solicitor, but was to include the costs of the mortgagee's solicitor, which he was to pay. This is a serious misstatement. I therefore agree that the appeal must be allowed with costs.

Solicitors: *W. A. Greene; Woodrooffe, Burgess, & Loch.*

M. W.

C. A. 1882 KAY, J. *Dec.* 8, 15. C. A. 1883 *Nov.* 15, 17; *Dec.* 4.

In re COLOMBIA CHEMICAL FACTORY MANURE AND PHOSPHATE WORKS.

HEWITT'S CASE.

BRETT'S CASE.

Company—Winding-up—Directors' Qualification—Subscriber of Memorandum—Contract to obtain Qualification—Reasonable Time for Performance—Abortive Company.

A company was registered in June, 1879. *B.* and *H.* signed the memorandum of association as subscribers for one share each. By the articles *B.* and *H.* were named as original directors, and it was provided that the qualification of a director should be fifty shares. *B.* and *H.* attended meetings of the directors, but no shares were allotted to them, nor did their names appear on the register for any shares except those for which they had signed the memorandum. In September *B.* resigned his office, but *H.* continued a director. No business was ever done by the company, and in November a resolution was passed to wind up the company. The liquidator placed *B.* and *H.* on the list of contributories for fifty shares each:—

Held (affirming the decision of *Kay*, J.), that assuming that the contract entered into by *B.* and *H.* to obtain a qualification amounted to an agreement to take fifty shares within the 23rd section of the *Companies Act*, 1862, they were entitled to a reasonable time for performing the agreement, and that under the circumstances such reasonable time had not elapsed at the commencement of the winding-up of the company. Consequently they could not be held liable as contributories in respect of the fifty shares.

Whether the contract amounted to an agreement to take the fifty shares within the 23rd section, *quære.*

THE *Colombia Chemical Factory Manure and Phosphate Works, Limited,* was registered on the 17th of June, 1879, with a nominal

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capital of £200,000, divided into shares of £10 each. The company was formed for the purpose of purchasing the chemical factory of Mr. *F. J. Lightfoot*, and of carrying on the works there.

Mr. *Richard Hewitt* and Sir *Wilford Brett* signed the memorandum of association and articles as subscribers for one share each.

Clause 55 of the articles of association was as follows:—

"The first directors shall be *Frederick James Lightfoot*, *Richard Hewitt*, Esq., and Sir *Wilford Brett*, and such two other persons as may be nominated by a meeting of preference shareholders to be convened and conducted by the existing board in the manner herein prescribed for general meetings of the company at some convenient place and time within twelve months from the registration of the company: Provided that (except that the chairman may give a casting vote in the event of an equality of votes) no member of such existing board shall vote at such meeting: Provided further that any person not qualified may be nominated at such meeting, and his appointment shall take effect upon his qualifying within one week of his nomination. The number of directors shall not be less than three nor more than seven."

Clause 57 was as follows:—

"The qualification of a director, whether hereby appointed or not, shall be the holding in his own right shares to the nominal amount of £500 upon which all calls due have been paid. Provided that this clause shall not invalidate any acts of the first directors prior to their being so qualified, but, except in the case of an appointment before the first general meeting, no person other than a retiring director shall be elected a director unless he shall have held his qualification for at least three months next preceding the date of his election, and at least seven days and not more than fourteen days notice shall have been left at the registered office of the company of the intention to propose him."

Clause 63 provided that the office of a director should be vacated if he ceased to hold his qualification.

Sir *W. Brett* and Mr. *Hewitt* attended a meeting of directors on the 11th of August, 1879.

Sir *W. Brett* also attended a second meeting on the 13th of August, from which Mr. *Hewitt* was absent, at which the agreement for the purchase of the works from Mr. *Lightfoot* received the seal of the company.

On the 2nd of October *Lightfoot* and *Hewitt* were present, and a letter was presented by the secretary from Sir *W. Brett*, dated the 17th of September, in which he resigned the office of director. *Hewitt* still remained a director, but neither he nor Sir *W. Brett* ever applied for any shares, nor were any allotted to them; and their names appeared on the register of shareholders only for the single shares for which they had subscribed the memorandum of association.

No shares were allotted or were taken up by the public, and no business was done by the company, and on the 5th of November, 1879, a resolution was passed, which was afterwards confirmed, for winding up the company voluntarily.

On the 9th of January, 1880, a petition for a compulsory winding-up was presented by a creditor, under which an order was made on the 24th of January.

The official liquidator placed Sir *W. Brett* and Mr. *Hewitt* on the list of contributories for fifty shares of £10 each in respect of their qualification as directors. The matter was then brought before Mr. Justice *Kay*.

The case of Sir *W. Brett* was first argued.

W. Pearson, Q.C., and *E. S. Ford*, for the official liquidator.

Hastings, Q.C., and *Brooksbank*, for Sir *W. Brett*.

1882. Dec. 15. KAY, J. (after stating the facts of the case), proceeded:—

It is clear that the 57th article applies in terms to the directors appointed by the articles, which would include Sir *W. Brett*, and it undoubtedly became his duty within a reasonable time to obtain fifty £10 shares as his director's qualification.

Art. 57 plainly contemplated that there might be some interval of time before the directors appointed by the articles obtained their qualification, because it provides that the acts of such

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directors shall not by that article be rendered invalid prior to their being so qualified. And if a director did not obtain his qualification within a reasonable time his office might probably be treated as vacated under art. 63.

The cases on this subject seem to be divisible into the following classes:—

(1.) Where under similar articles a director has simply accepted the office, and there it is held he is not a contributory.

(2.) Where, after accepting and while he is director, shares have been registered in his name, and there he is presumed to know what was done, and to have accepted such shares.

(3.) Where the articles make the possession of the qualification of shares a condition precedent, and there it is held that the director may have been improperly appointed, and he is not a contributory.

(4.) There is a separate class of cases in which, by virtue of the special terms of the articles or of the company's charter, a director on accepting the office becomes *ipso facto* a shareholder.

The last class of cases (within which it is contended that this comes) is where a director has not merely accepted that office but has acted as director, and it is contended that in that case there is an implied agreement on his part with the company to take from the company the proper number of shares for his qualification. One difficulty seems to be to know when this agreement was come to. It is clear that it was not made at the moment of accepting the office of director.

In the *Marquis of Abercorn's Case* (1) he had consented to become a director, and was elected in October, 1853. He never in any way acted as a director, and he retired about December, 1854; and it was held that he was not a contributory.

In *Brown's Case* (2) *Brown* was appointed a director, and was present at the next meeting of directors. Lord *Selborne* there said (3): "Mr. *Jackson* has argued that in a company, the rules of which require that the directors should have the qualification of a certain number of shares, the mere acceptance of the office of director by a person who has not the necessary number of shares

(1) 4 D. F. & J. 78. (2) Law Rep. 9 Ch. 102.
(3) Law Rep. 9 Ch. 105.

carries with it from that moment of time (I think the argument must be carried so far) an implied contract that he will take from the company that number of shares, either immediately or at least before he acts as director.

"Without, in the first instance, referring to authority, it is obvious that the argument labours under this difficulty, that the qualification clause does not require that the director shall take shares from the company. The clause at the utmost means only that if he acts as he ought to act, with the proper qualification (without which he is no doubt disqualified), he must in some way possess himself of the necessary number of shares. But in whatever way he may manage to possess himself of those shares, if he does so he has the qualification; and it is quite unnecessary that he should for that purpose enter into a contract with the company, and so become the original holder of shares, if it is possible for him to acquire them otherwise.

"Now the authorities which have been cited really are inconsistent with Mr. *Jackson's* argument. The only case in which the question was neatly raised was the *Marquis of Abercorn's Case* (1), which was before the Court of Appeal, at that time presided over by Lord Justice *Knight Bruce* and Lord Justice *Turner;* and in that case the naked question was raised whether from the acceptance of the office of director, and the consequent authorized representation to the world that the person so accepting was a director, such representation being continued over a certain period of time—whether from that alone a contract with the company to take shares could be inferred. In that particular case the option was either to have shares or to insure in the company. But there were various ways by which the shares might be acquired, and the Lords Justices held that, from the mere acceptance of the office of director, without more, they could not infer a contract to become a shareholder.

"The other authorities are all cases in which, as a matter of fact, shares had been registered in the name of the director—which circumstance occurs in this case also—and in those other cases it was, in my opinion, most justly regarded as a very material fact to be considered, when a director tried to get rid of

(1) 4 D. F. & J. 78.

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the shares actually registered in his name, that he had accepted the office of director, which a man ought not to fill without qualification. In such cases a director must have a qualification, and is bound as a director to be acquainted with what is done in the management of the affairs of the company. It was, therefore, a just conclusion of fact, that an act done by a person acting under the authority of the directors, the result of which was to place in the name of a director shares which he ought to have as a qualification—that that act was done by his authority, and that he could not be allowed to repudiate it. For my part I see no reason to doubt that the various cases which arose on that state of circumstances were well decided. There may be found in some of the cases (I think before Vice-Chancellor *Malins* in particular) some *dicta* not necessary for the decision of the question, which would appear to go to an extent not *primâ facie* reconcilable with the decision in the *Marquis of Abercorn's Case* (1) as to the value of the single circumstance of acceptance of the office of director. But it seems to me to be only just to the learned Judge from whom those *dicta* proceeded to remember, that Judges have tacitly in their minds the circumstances and facts of the particular case before them, when they speak of the influence of any material fact in the evidence which they have to consider. They are not to be supposed to forget that there are other facts, but they speak of the value of the particular fact bearing in mind the general character of the entire case.

"I think, therefore, that it would not be placing a fair interpretation on the language found in some of those cases, if we were to infer that the learned Judge from whom that language proceeded, felt himself authorized in judicially expressing dissent from what was decided by the Lords Justices in the *Marquis of Abercorn's Case*. I do not, for my own part, place that interpretation on the language in question.

"The true result to be drawn from those authorities appears to be, that the fact of a man accepting the place of director, for which the possession of a certain number of shares is a necessary qualification, is most material in determining whether he shall or shall not be permitted to repudiate, as unauthorized by himself,

(1) 4 D. F. & J. 78.

the registration of shares which in the ordinary course of the business of the company have actually been placed in his name and which were needful for his qualification."

Lord Justice *Mellish* says (1): "I do not mean to say that if a person assented to becoming a director, and had shares allotted to him of the number for his qualification, and for a considerable time went on and acted as a director, then you might not infer that he had agreed to accept the shares. But in this particular case it is, in my opinion, impossible to infer that *Brown* ever assented to take any other shares in the company; and to hold that he did so, would be to hold that he became a shareholder contrary to his own intention."

In *Leeke's Case* (2) it was decided that where a director actually had shares allotted to him and they were registered in his name, he must be taken to have accepted them. And in *Brown's Case,* Lord Justice *James* (3), referring to that decision, says it was not intended to overrule the *Marquis of Abercorn's Case* (4), "but I intended merely to say that becoming a director involved an agreement to have the qualifying shares." Now if that sentence were read by itself, it might seem to be in direct conflict with the decision in the *Marquis of Abercorn's Case,* but it is obvious from the facts in *Leeke's Case,* that what the Lord Justice meant was that the director in question must be taken to have assented to the allotment and registration of the shares which were actually registered in his name, and not that being a director involved an agreement to take from the company the qualifying shares, when none had been allotted to him.

In *Green's Case* (5), the director attended three board meetings in March, April and May, signed the attendance book, permitted the publication of his name as a director in a prospectus issued to raise further capital, and when called upon to qualify himself withdrew his name, and it was held that he was not a contributory. Reference was then made to *Austin's Case* (6), where the director attended one board meeting and signed a cheque as director, but when a letter of allotment of shares was sent to him

(1) Law Rep. 9 Ch. 110.
(2) Ibid. 6 Ch. 469.
(3) Ibid. 9 Ch. 109.
(4) 4 D. F. & J. 78.
(5) Law Rep. 18 Eq. 428.
(6) Ibid. 2 Eq. 435.

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he refused to receive them and withdrew from being a director, and it was held he was not a contributory.

In *Karuth's Case* (1), the director signed the memorandum and the articles, but did not act as director, and withdrew about a month after his appointment; and it was held he was not a contributory for qualification shares.

Considerable reliance has been placed upon the *dictum* in the judgment in that case, that "the acceptance of the office and the acting as a director will be taken as an implied agreement on his part to qualify himself within a reasonable time; and he will not be allowed afterwards to contradict his own conduct;" but in the same judgment the learned Judge assents to the remark in *Brown's Case* (2), that he is not obliged to take shares from the company, and the words read, as the Lord Chancellor in the passage I have quoted says *dicta* should be read, *i.e.*, with reference to the facts of the particular case, seem to me to mean that if shares have been allotted to him, he must be taken to have accepted them.

In *Miller's Case* (3), the director had been registered as a shareholder, and the learned Judge before whom the case first came, said that he had no option, as "he had acted as director, but to hold that he had authorized that registration not in fact but in law."

In the *Esparto Trading Company* (4), *Goddard*, the managing director, was debited in the books of the company with calls upon four qualification shares, he attended a series of board meetings and applied to the company to cancel his shares. The article in that case as to qualification was that "every director of the company shall at the time of his appointment and thenceforth during his continuance in office," hold four shares, and if he should cease to do so, his office should thereupon become immediately vacant. By the same articles *Goddard* was appointed a director, and Vice-Chancellor *Hall*, upon the authority of *Portal* v. *Emmens* (5), which was a case under an Act of Parliament, held that by the force of these articles, "directly *Goddard* was

(1) Law Rep. 20 Eq. 506, 511.
(2) Ibid. 9 Ch. 105.
(3) 3 Ch. D. 661, 664; 5 Ch. D. 70.
(4) 12 Ch. D. 191, 203.
(5) 1 C. P. D. 201, 664.

appointed he became a director and holder of four shares," thus treating the case as being one of the fourth class which I have mentioned. Moreover, it was held that upon the authority of *Brown's Case* (1) he must be taken to have known that, though not registered, he was treated in the books of the company as the holder of four shares.

In the case of the *Hampshire Co-operative Milk Company, Purcell's Case*, of which a short note is given in W. N. for 1880, p. 194, and a longer report in 29 W. R. 170, I have been furnished with the brief; and it seems that the facts were that a resolution was passed that *Purcell* should be invited to a seat on the board "on his qualifying himself for the office," and also that he be asked to accept the office of medical examiner. This was communicated to him and a copy of the resolution containing the words I have read was sent to him, and he wrote in answer in June, "I shall be most happy to comply with same, viz., accepting a seat on the board and accepting the office of medical examiner." He was appointed chairman and attended meetings from July to September, and being pressed to complete his qualification, he wrote in October, "As to my own qualification I am ready with the amount, but perhaps you will give me credit if I do not part with it until I see the company's accounts placed before me in a more favourable light." In the same month he resigned. Vice-Chancellor *Hall* held that by the letter of June he became a shareholder, obviously treating that as an agreement to take the qualification shares as well as to become a director.

The case of the applicant, as submitted to the Court, has consisted of a citation of these cases and *dicta*, without any attempt to reason on the principle they involve.

Not one of these cases decides that a man by accepting the office of director and acting as such at two meetings, is thereby made a shareholder.

In order to make him a shareholder it is necessary to prove that he has agreed to take shares. The contention on behalf of the liquidator seems to me to confound duty with contract. It may have been the duty of Sir *W. Brett* to take shares, but unless

(1) Law Rep. 9 Ch. 102.

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he agreed to take shares from the company he is not a shareholder. The *Marquis of Abercorn's Case* (1) decides that acceptance of the office of director, though it imposed upon the person accepting the duty of obtaining the proper number of qualification shares in some manner, did not make him a shareholder. How can attending at two meetings alter his position in that respect? It may make his duty more evident and clear, but the duty was to obtain a certain number of shares, and acting as a director is not taking shares or agreeing to take them from the company.

Moreover, as I have pointed out, it was held in *Brown's Case* (2) he was at liberty to buy shares in the market, or to obtain them in any way he pleased, and therefore he was not bound to take them from the company; and it seems to me impossible by any process of fair reasoning to arrive at the conclusion that he ever agreed, expressly or by implication, to become an allottee of shares.

If there was any implied contract it was not a contract to become an allottee, *i.e.*, to take shares from the company; and nothing less than this would make him a shareholder. Sir *W. Brett's* name must therefore be removed from the list, except in respect of the share for which he signed the memorandum.

A similar order was made in the case of Mr. *Hewitt*.

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C. A.

From these orders the official liquidator appealed. The appeals came on for hearing on the 15th of November, 1883.

W. Pearson, Q.C., and *E. S. Ford*, for the official liquidator:—

The cases of the two directors are precisely similar, except that Sir *W. Brett* resigned his office before the winding-up, and *Hewitt* did not resign. But they both signed the articles by which they were appointed directors, and by so doing they contracted to qualify themselves as directors, and they both acted as directors by attending the board meetings. Therefore there was a binding contract that they should take the shares requisite for their qualification: *Companies Act*, 1862, s. 16; *Currie's Case* (3); *Harward's*

(1) 4 D. F. & J. 78. (2) Law Rep. 9 Ch. 102.
(3) 3 D. J. & S. 367.

Case (1); *Leeke's Case* (2); *Brown's Case* (3); *Karuth's Case* (4); *Miller's Case* (5); *In re Esparto Trading Company* (6); *Marquis of Abercorn's Case* (7); *Austin's Case* (8); *Green's Case* (9). It makes no difference that there was no formal allotment, and that their names were not on the register for those shares, because they were themselves directors, and it was their duty to allot the shares and have them registered. They cannot take advantage of their own negligence: *Portal* v. *Emmens* (10); *Forbes' Case* (11).

It may be said that the directors had a reasonable time within which to qualify themselves. If so, such reasonable time had expired. No doubt where a director is elected after the shares are all allotted he must be allowed a sufficient time to buy them in the market; but that does not apply to original directors, it was their duty to take the shares at once, and a reasonable time had elapsed as soon as they began to act.

Higgins, Q.C., and *Vernon R. Smith*, for *Hewitt*, and

Hastings, Q.C., and *Brooksbank*, for Sir *W. Brett*:—

There was no contract binding upon both parties to allot and accept shares. There was no *consensus* between the parties. In all the cases cited the shares had been either allotted or registered, by which the company was bound; and it was held that the directors by acting had accepted such allotment or registration, and so there was a binding agreement: *Leeke's Case*; *Currie's Case* (12); *Miller's Case*.

Chapman's Case (13) shews that the company was not bound to allot any shares to the directors. If there was any contract at all it was a contract that the directors should qualify themselves by taking fifty shares, either by accepting an allotment from the

(1) Law Rep. 13 Eq. 30.
(2) Ibid. 6 Ch. 469.
(3) Ibid. 9 Ch. 102.
(4) Ibid. 20 Eq. 506.
(5) 3 Ch. D. 661.
(6) 12 Ch. D. 191.
(7) 4 D. F. & J. 78.
(8) Law Rep. 2 Eq. 435.
(9) Ibid. 18 Eq. 428.
(10) 1 C. P. D. 201, 219.
(11) Law Rep. 19 Eq. 353.
(12) 3 D. J. & S. 367.
(13) Law Rep. 2 Eq. 567.

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company or by taking a transfer from some shareholder. That was a contract which the directors had a reasonable time to perform, and no reasonable time had elapsed in this case. The time for allotting shares had not come; the only acts which the directors had done before the winding-up were formal and preliminary.

HEWITT'S CASE.

E. S. Ford, in reply.

BRETT'S CASE.

Their Lordships reserved judgment.

1883. Dec. 4. COTTON, L.J., delivered the judgment of the Court (*Cotton*, *Lindley*, and *Fry*, L.JJ.) as follows:—

This is an appeal from an order of Mr. Justice *Kay*, by which he refused to place Sir *W. Brett* and Mr. *Hewitt* on the list of contributories of the company for fifty shares of £10 each, which was their qualification as directors. Both of these gentlemen subscribed the memorandum of association for one share each, and signed the articles of association.

The 55th and 57th clauses of the articles of association were as follows:—[His Lordship read the clauses.] The company had a very short existence. It was registered on the 17th of June, 1879, and a resolution to wind up voluntarily was passed on the 5th of November in the same year. Both Sir *W. Brett* and Mr. *Hewitt* accepted the office of director. Sir *W. Brett* attended two meetings of the board and then resigned; Mr. *Hewitt* remained and acted as a director until the winding-up of the company. Neither Sir *W. Brett* nor Mr. *Hewitt* applied for any shares in the company, and no shares except those for which they signed the memorandum of association were ever allotted to either of them or treated in the books as belonging to them. The liquidator now seeks to put them on the list in respect of the shares in question on the ground of the stipulation in the articles as to the directors' qualification.

Under sect. 16 of the *Companies Act*, 1862, they must be considered as having by signing the articles entered into a covenant to conform to all the regulations therein contained. The articles to which I have referred therefore amount to a covenant to become

directors and to obtain the necessary qualification. But under the circumstances to make them contributories in respect of the shares now in question, it must be established that this amounts to an agreement to become a member in respect of the qualification shares within the meaning of sect. 23 of the Act of 1862. To satisfy this section it must be established that there was an agreement between the company and the alleged contributories for the latter to take from the company, and the company to give, the shares. The agreement to obtain the shares necessary for a director's qualification may be performed either by taking shares from the company or by taking them from any shareholder, and an agreement with a shareholder to take his shares would not be an agreement within sect. 23 of the Act.

Many cases however, were cited in the argument in support of the liquidator's contention. But in none of the cases has any one been held liable for the shares necessary to make up his qualification under circumstances like these of the present case, though undoubtedly in several cases expressions have been used by Judges which apparently support the contention. But it will be found that when the directors have been held liable, either the shares had been entered in the register or treated as allotted in the other books of the company. In *Miller's Case* (1) the director's name was registered for the shares required for his qualification. In *Harward's Case* (2) and *Brown's Case* (3) the shares were allotted to the director by the allotment committee; and in *Leeke's Case* (4) the shares were both allotted and registered. In the case of *In re Esparto Trading Company* (5) the shares, though not registered in the name of the director, were treated in the books of the company as belonging to him and he was debited with the sum payable on allotment. In that case the shares were treated as belonging to the person who while these entries were in the books was acting as a director, and he was treated as having known and assented to the entries, and as thus having accepted shares offered to him by the company.

(1) 3 Ch. D. 661.
(2) Law Rep. 13 Eq. 30.
(3) Law Rep. 9 Ch. 102.
(4) Ibid. 6 Ch. 469.
(5) 12 Ch. D. 191.

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There were thus special circumstances in each of these cases which prevent its being an authority in the present case.

There is a difference of opinion between the members of the Court on the question whether the contract entered into by these directors to obtain a qualification does amount to an agreement to take shares within the meaning of the 23rd section, and in the view of this case in which we all agree it is not necessary to decide, and we think it better not to express any opinion on, this point. The contract of a director under such articles to acquire the necessary qualification, whatever its effect as regards sect. 23, must be to do so within a reasonable time; that is, the director must be allowed a reasonable time for performance. What is a reasonable time must depend on the circumstances of each case. Where the company is an established and going concern, the reasonable time within which the contract is to be performed may be before the alleged contributory has begun to act. For the reason of requiring a qualification is the protection of the shareholders, and with that object to secure that persons acting in the management of the affairs of the company shall have a substantial pecuniary interest in it. In the present case, as the directors named in the articles signed the memorandum for one share each only, it could not have been intended that they should not act before they had the qualification. If it had been so they would have been required to sign the memorandum for the amount of shares necessary to give the qualification. In the present case, the company, though formally constituted, never had any business existence. No member of the public who had not signed the memorandum ever applied for or had allotted to him shares in the company; the board of the company was not fully constituted, no business was ever done, and nothing was done except to vary and complete as varied the agreement with *Lightfoot*, the working of which was to constitute the business of the company. The whole thing was inchoate only. Having regard to these circumstances, and to the very short time during which the company had even a formal existence, we are of opinion that, whatever, as regards the position of Sir *W. Brett* and Mr. *Hewitt* under sect. 23. may be the effect of the contract to acquire a

qualification, a reasonable time for completing that contract had not elapsed before the company was wound up, and that neither Sir *W. Brett* nor Mr. *Hewitt* can be held a contributory in respect of any shares except those for which they respectively signed the memorandum of association.

Solicitor for the Official Liquidator: *T. C. Russel.*
Solicitors for Sir *W. Brett: Sheppard & Riley.*
Solicitors for Mr. *Hewitt: Lovell, Son, & Pitfield.*

M. W.

In re KNIGHT.
KNIGHT *v.* GARDNER.

[1879 K. 30.]

Practice—Rules of Court, 1875, *Order* XXXVIII., *r.* 4—*Affidavit—Cross-examination—Expenses of producing Affidavit Witness for Cross-examination.*

The provision in Rules of Court, 1875, Order XXXVIII., rule 4, that the party producing deponents for cross-examination upon their affidavits shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, is confined to a cross-examination of the deponents before the Court at the trial of the action, and does not apply to a cross-examination on an affidavit filed after decree for the purpose of proceedings in Chambers.

Decision of *Bacon*, V.-C., reversed.

IN this action, in which a decree had been made for the administration of the estate of *Edward Knight,* one *Richard Knight,* in answer to advertisements issued by direction of the Judge in Chambers, brought in a claim as heir-at-law of *Edward Knight,* and several persons made affidavits in support of his claim. *John Sutton Page,* who had obtained leave to attend the proceedings, gave notice to cross-examine these witnesses, and *Richard Knight* applied by summons to appoint a special examiner. The question having been raised who should bear the expenses of producing the witnesses for cross-examination, *Richard Knight* applied in Chambers for a direction that the costs should be borne in the first instance by *John Sutton Page.* The whole case was adjourned into Court, and Vice-Chancellor *Bacon* made an order appointing

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a special examiner, and reserving to the hearing of *Richard Knight's* claim the question by whom the costs of the application in Chambers and the adjournment into Court should be borne, but directing that "the expense of producing the witnesses above-named before the examiner is to be in the first place borne by the person producing such witnesses for cross-examination (1)."

Richard Knight, on the 4th of August, 1883, gave notice of appeal, asking that this order might be varied, and that an order might be made directing the expenses to be paid in the first instance by *J. S. Page*. The appeal was heard on the 12th of December, and the witnesses had not yet been produced for cross-examination.

Method, and *E. Jennings*, for the Appellant:—

The case is governed by the General Order of the 5th of February, 1861, rule 19. The provision in the General Orders of 1875, Order XXXVIII., rule 4, alters the previous practice as to the expenses of a witness called to be cross-examined before the Court at the trial, but does not apply to cross-examination before a special examiner or to cross-examination in Chambers.

Marten, Q.C., *contrà*:—

After the passing of the *Judicature Acts*, the Act of 1852 (15 & 16 Vict. c. 86) must be read as if the 38th of the General Orders of 1875 had been substituted for sect. 38 of the Act, and sect. 41 must be treated as adapted to the altered practice. That section is in substance an enactment that the same practice shall prevail as to evidence after decree as applies to evidence at the hearing, and effect must be given to it accordingly. On any other view there would be the inconvenience of having two inconsistent courses of practice. The 38th Order made a deliberate alteration of the practice as to who should bear the expenses of a witness in the first instance, and it should be carried out consistently. The word "trial" is not used in a technical sense, but applies to any occasion when a matter in dispute is

(1) 24 Ch. D. 606.

decided upon. As the witness has not been produced, the case must ultimately be decided under the Rules of 1883, and under them we are right.

[*Methold* :—We do not admit that you are right under the new Rules; that will have to be tried hereafter if we succeed now.]

COTTON, L.J. :—

I cannot agree with the conclusion of the Vice-Chancellor. His Lordship went on the ground that Order XXXVIII., rule 4, applied to the case, and that he was bound to enforce it. But the words of that rule expressly refer to evidence at the trial, and were only intended to apply where at the trial the evidence is taken by affidavit. Where the cross-examination is not to take place at the trial the case is not provided for by the General Orders of 1875, and we are thrown back on the old practice. The 38th section of the Act of 1852 deals with evidence at the trial, and provides that a witness who has made an affidavit and is required to be cross-examined shall, as regards expenses, be considered the witness of the party cross-examining. This would throw the expense of producing him in the first instance on the party wishing to cross-examine him. Then sect. 41 refers to evidence subsequent to the trial, and provides that it shall be taken as nearly as may be in the same manner as thereinbefore provided with reference to the taking of evidence with a view to the hearing. This makes the expense payable in the first instance by the party cross-examining, and the Order of the 5th of February, 1861, rule 19, is express to the same effect. It is urged that sect. 38 of the Act of 1852 is repealed by the General Order of 1875, XXXVIII., rule 4, and that we must read sect. 41 as referring to the mode of taking evidence at the trial prescribed by that new rule. I think that would not be a sound construction. It is true that the rule imports a different practice as to evidence to be used at the trial; but we have to construe sect. 41, and we can only treat it as referring to what was provided in the former part of the statute as to evidence at the trial, and not to a new course of practice subsequently introduced. In my opinion Order XXXVIII., rule 4, does not apply to evidence taken after the hearing, and whether we look to the Act of

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1852 or to the Order of the 5th of February, 1861, rule 19, the expenses of producing the witness for cross-examination, as the practice stood at the time when the order under appeal was made, were payable in the first instance by the person requiring the production. As the new Rules have now come into operation, and the witness has not been produced, all we can do is to strike out from the order the direction as to the expenses of production, which was inconsistent with the practice as it stood at the time of making the order, leaving it to be decided hereafter how the expenses are to be in the first instance borne.

LINDLEY, L.J. :—

The Vice-Chancellor went on the ground that Order XXXVIII., rule 4, applies to all proceedings, and is plain and distinct. I cannot take that view. I think it was not intended to apply to any cases except those where by consent the evidence to be used at the trial is taken by affidavit. So far, then, as the *Judicature Acts* and Rules are concerned, the present case is not provided for. That being so, then, by sect. 21 of the *Judicature Act*, 1875, the old practice remains in force on this subject, and under it I am of opinion that the expenses were payable in the first instance by the person requiring the production of the deponents for cross-examination. Mr. *Marten's* argument that the Judicature Rules alter the construction of sect. 41 of the Act of 1852, appears to me inadmissible. I agree that we ought to confine ourselves to striking out the Vice-Chancellor's direction as to the expenses.

FRY, L.J. :—

I am of the same opinion. The Vice-Chancellor did not decide on the ground that he had a discretion, but on the construction of Order XXXVIII., rule 4, which he considered to leave him no discretion. I am of opinion that that rule applies only to evidence at the trial. Mr. *Marten* argues that the word "trial" is not a technical word, but is used in a sense which will include a proceeding before the Chief Clerk. I cannot agree with that view. I think that the word is a technical word, and used in its proper technical sense in the rule in question. That rule, then, does not apply to the case, and we have to refer to the

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old practice. The Order of the 5th of February, 1861, rule 19, is express, and the 38th section of 15 & 16 Vict. c. 86, provides that the expenses attending the cross-examination and re-examination of a witness who has made an affidavit shall be paid by the parties respectively in like manner as if the witness to be cross-examined were the witness of the party cross-examining, which would oblige the party cross-examining to pay the expenses in the first instance. This applies to a witness who has made an affidavit to be used at the hearing, and then sect. 41 provides that evidence after the hearing shall be taken as nearly as may be "in the manner hereinbefore provided" with reference to the taking evidence with a view to such hearing. The expenses, then, must be disposed of in the same way as was directed by sect. 38 as to evidence at the hearing. I cannot accede to the contention that the alteration made by General Order XXXVIII., rule 4, in the mode of taking evidence at the trial, alters the construction to be put on sect. 41. I therefore agree that the direction of the Vice-Chancellor must be expunged.

Solicitors: *Jennings, Son, & Burton; W. S. Page.*

H. C. J.

In re LACEY & SON.

C. A. 1883 V.-C. B. *Nov.* 17. C. A. *Dec.* 12, 13.

Solicitors' Charges—Taxation—Pressure—Rules under Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*Percentage.*

A tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor's costs, gave notice in December, 1882, of his exercise of the option, and stated that he should not require an abstract of title. The time for completion was the 25th of March, 1883, but it was arranged for the tenant's convenience that the completion should be six weeks earlier, and that the property should be conveyed in two lots. He sent his draft conveyances for perusal before the end of December. On the 2nd of February, 1883, the vendor's solicitors sent in their bill of costs, in which they charged 30*s.* per cent. on the purchase-money of each lot, considering that this was the proper charge under Schedule I. to the general rules under the *Solicitors' Remuneration Act*, 1881, which provides that amount of remuneration to a vendor's solicitor "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)."

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The purchaser's solicitors objected to these charges, but the vendor's solicitors refused to allow completion unless they were paid, and on the 14th of February the purchaser paid them under protest, and completed the purchase. After this he applied for taxation of the bill :—

Held, by *Bacon*, V.C., that an order must be made for taxation of the bill with a direction that the taxation should be on the old system prevailing before the *Solicitors' Remuneration Act*, 1881 :

Held, on appeal, that the case was governed by the new Rules, but that the bill was framed on an erroneous footing, for that the *ad valorem* remuneration authorized by Schedule I. was chargeable only where the whole of the business in respect of which it was imposed, viz., the deducing title and perusing and completing conveyance, was done; that here, as there was no deducing of title, but only perusal and completion of the conveyances, Schedule I. did not apply, but that under the General Order, rule 2 (*c*), the solicitor's remuneration was to be regulated by the old system as modified by Schedule II.

But *held*, that, having regard to the dates, there was no pressure, and that there was no overcharge amounting to fraud, and that there were therefore no special circumstances to authorize taxation after payment.

BY an agreement, dated the 19th of December, 1881, between *A. H. Parken*, thereinafter called the lessor, and *C. A. D. George*, thereinafter called the lessee, it was agreed that, as soon as the lessee should have erected and covered in certain houses on the piece of land therein mentioned, the lessor should grant him a lease of it for ninety-nine years from the 29th of September, 1881, at the rent therein-mentioned, payable on the four usual quarter days. It was provided that this lease should contain an agreement that if the lessee, his executors, administrators, or assigns, should at any time within the first five years of the demise give the lessor notice in writing of his or their intention to purchase the reversion in fee simple at the price of £2205, then the person or persons giving such notice should purchase the reversion at that price, subject to the conditions thereinafter contained, among which were the following: "1. The purchase-money shall be paid and the purchase completed on such one of the quarterly days hereby appointed for payment of rent as shall happen next after the end of three calendar months from the date of such notice. 3. Upon payment of the purchase-money and all arrears of rent at the time aforesaid, the vendor shall execute a proper conveyance of the said premises to the purchaser to be prepared by and at the expense of the purchaser, and shall

contain the like covenants on the part of the purchaser as are hereinbefore contained on the part of the lessee to pay the expense of maintaining and keeping in repair the said road, sewer, and footway, and not to erect any additional building, wall, or fence, or make any alterations in the plan or elevation of the said messuages and premises without licence of the vendor, nor carry on any trade or business, or do any act which may be an annoyance or disturbance to the vendor or his tenants or the neighbourhood. The person or persons to whom such conveyance shall be made shall execute and deliver to the vendor a duplicate of the said deed of conveyance, such duplicate to be prepared by the solicitor of the vendor, and the costs thereof, and all other costs of the vendor of and attending the said purchase, or incidental thereto, including the abstract of title, shall be borne by the purchaser. 4. The vendor shall within one calendar month from the date of such notice as aforesaid deliver to the purchaser or his solicitor an abstract of the vendor's title to the said premises, such title to commence with an indenture of conveyance to the vendor dated the 19th of October, 1881, and the purchaser shall make no objections or inquiry as to the earlier title."

By a subsequent agreement the terms of this agreement were varied, and the purchase-money was increased to £2362 10*s*.

In December, 1882, *George* gave two notices of his intention to purchase, one notice relating to part of the property and the other notice to the remainder. The solicitors of *George* gave notice to Messrs. *Lacey & Son*, the solicitors of *Parken*, that no abstracts of title would be required, and the draft conveyances were forwarded for perusal on the 29th of December, 1882. The length of each was about twenty-eight folios. The time for completion was the 25th of March, 1883, but at the purchaser's request the completion was arranged to take place about six weeks earlier.

The rules under the *Solicitors' Remuneration Act*, 1881, came into operation from and after the 31st of December, 1882.

On the 2nd of February *Lacey & Son* sent to *George's* solicitors an account of what *George* would have to pay on completion, including the following item:—

"Our costs, as per other side, and stamps paid for you . . . . . £50 10"

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Adding the note, "Your conveyances being unstamped we have had to stamp them and to get denoting stamps affixed."

The account of costs was as follows:—

"Messrs. *Lacey & Son's* charges.

"*Parken* to *George*.

"1883. Feb. 2.	£	s.	d.
As to conveyance of plot for £1125	16	10	0
Perusal on behalf of Mrs. *Rotton* and Mr. *Dwarris*	2	0	0
Stamp on conveyance	5	15	0
„ duplicate	0	5	0
As to conveyance of plot for £1237 10*s.*	17	10	0
Perusal on behalf of Mrs. *Rotton* and Mr. *Dwarris*	2	0	0
Stamp on conveyance	6	5	0
„ duplicate	0	5	0
	£50	10	0"

Mrs. *Rotton* and *Dwarris* were mortgagees who concurred in the conveyances.

George's solicitors on the 5th wrote to *Lacey & Son* objecting to a charge being made according to the percentage scale fixed by the new Rules: "The purchase being carried out under an agreement made long before the rules came into operation, and when no such charge for costs could have been contemplated by the purchaser, we do not think that the scale applies." They went on to propose that the purchase should be completed on payment of the amount claimed exclusive of the £50 10*s.*, letting that stand over till the amount could be settled.

Lacey & Son declined to accede to this proposal or to part with the deeds except on payment of the whole sum, and on the 14th of February *George's* solicitors wrote to *Lacey & Son* a letter inclosing cheques for the full amount, stating that the delay which would be entailed by taxation would be so prejudicial to the purchaser that he had directed them to pay the costs, but only under protest, and that unless a settlement could be come to they should apply to have them taxed. On the 21st the deeds, duly executed, were sent to the purchaser.

On the 4th of October, 1883, a summons was taken out on

behalf of *George* to have the bill taxed, and was adjourned into Court and heard before Vice-Chancellor *Bacon* on the 17th of November, 1883.

T. Brett, for the purchaser:—

We ask to have the solicitor's bill taxed according to the agreement of December, 1881, under the scale in force before the General Order under the *Solicitors' Remuneration Act*, 1881, came into operation. At the time when the agreement of the 19th of December, 1881, was entered into, the General Order under the *Solicitors' Remuneration Act*, 1881, had not been issued, and it is contemplated by the Act, sects. 2, 4, that the provisions of the Act are not applicable until the General Order shall have come into operation. Reliance will be placed on sect. 7, which provides that as long as any General Order under the Act is in operation taxation shall be regulated thereby, but sect. 8 enables a solicitor and client to agree on the form and amount of remuneration and contract themselves out of the Act. In this case the parties must be presumed to have made their contract according to the law as it then existed (before the Act). But we rely mainly on the fact that everything was practically completed except the engrossing and execution of the conveyance before the 1st of January, 1883, from which date the General Order under the Act came into force. The purchaser has not lost his right to have the bill taxed, as the solicitors refused to allow the transaction to be completed until their bill was paid, and therefore payment was made under what has been held to amount to pressure such as to justify taxation after payment: *Morgan* and *Wurtzburg* on Costs (1); *In re Newman* (2); *Re Pugh* (3).

F. W. Bush, for Messrs. *Lacey & Son*, the solicitors:—

The business relating to the purchase was not transacted until after the 31st of December, 1882—the conveyance having been signed in February, 1883—and therefore by sect. 7 of the *Solicitors' Remuneration Act*, 1881, the taxation, if directed, must be regulated by the scale under the General Order which had then come into operation.

(1) Page 449. (2) Law Rep. 2 Ch. 707.
(3) 32 Beav. 173; 1 D. J. & S. 673.

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We submit, further, that this is not a case in which the Court will direct taxation on an application not made until eight months after payment of the bill. There was no pressure, as the purchaser had ample opportunity for examining the bill, which was delivered fourteen days before the date fixed for completion. He cited *In re Barrow* (1); *In re Neate* (2); *In re Welchman* (3); *Re Pugh* (4).

Bacon, V.C.:—

There is clear evidence of pressure in this case, so that the purchaser is entitled to have the bill taxed. The real question to be decided, however, is as to the effect of the *Solicitors' Remuneration Act*, 1881. From sect. 4 it is clear that it did not come into operation, and that the old practice was to subsist until the General Order to be made under the powers given by the Act should have come into force.

In this case every one of the particulars mentioned in sect. 4 to be taken into consideration in determining the amount of remuneration had been disposed of before the new Act came into operation. The capital was known, all skilled labour had been performed and all the documents had been prepared before the 31st of December, 1882, but the conveyance had not then been executed. Sect. 7, which says that as long as any General Order under this Act is in operation, the taxation of bills of costs of solicitors shall be regulated thereby, does not apply to transactions so far advanced as this was. In this case all the important matters had been performed before the Act came into operation, and nothing was done afterwards but the mere formal completion of the purchase.

Nothing whatever having therefore been done under the Act of 1881 taxation must take place under the old orders, and I direct the bill of Messrs. *Lacey & Son* to be taxed, regard being had to the scale in force prior to the General Order made in pursuance of the *Solicitors' Remuneration Act*, 1881.

Summons allowed with costs.

F. G. A. W.

(1) 17 Beav. 547.
(2) 10 Beav. 181.
(3) 11 Beav. 319.
(4) 32 Beav. 173; 1 D. J. & S. 673.

Lacey & Son appealed. The appeal came on for hearing on the 12th of December, 1883.

Millar, Q.C., and *Bush*, for the Appellants :—

First, we say that the bill cannot be taxed at all, as no application to tax was made until after payment. The petitioner had the bill in his hands from the 2nd to the 14th of February, and then paid it, so there was no pressure, and it is not alleged that there are overcharges amounting to fraud. Secondly, supposing the bill taxable, it ought to be taxed under the new rules made under the *Solicitors' Remuneration Act*, 1881, which were to take effect from the 31st of December, 1882.

Brett, contrà :—

The Vice-Chancellor thought that as the agreement had been entered into in 1881, and the negotiations had been completed in 1882, before the period covered by the new orders, the old scale of charges ought to apply. But supposing the case comes under the new rules, the first rule of the General Order provides that the schedule shall not apply to land the title to which is registered, which shews that it was intended that the scale should apply only in cases where the ordinary course of a sale is carried out. Here nothing was done but perusing a couple of short drafts. The work for which the *ad valorem* charges are given in Schedule I., part 1, was not done. That schedule, therefore, is inapplicable, and the case comes, by virtue of rule 2 (*c*), under the old scale as modified by Schedule II. I contend, however, that the Vice-Chancellor was right in holding the case not to be within the new rules at all. The Act is not retrospective and cannot apply to a contract entered into before it: *Ward* v. *Eyre* (1). There was sufficient pressure to authorize taxation: *In re Newman* (2); *Re Pugh* (3).

Millar, in reply :—

Pressure is out of the question, for the purchaser was not bound to complete till the 25th of March, and he chose to complete in

(1) 15 Ch. D. 130. (2) Law Rep. 2 Ch. 707.
(3) 32 Beav. 173; 1 D. J. & S. 673.

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February for his own convenience; the pressure was on his side. There is no case where the refusal to hand over deeds until the solicitor's claim has been satisfied has been held to amount to pressure where the bill has been delivered so long before as here: *In re Welchman* (1). The remarks of the Master of the Rolls in *In re Harrison* (2) apply here; there is no ground for taxation but alleged overcharge.

[COTTON, L.J.:—Is there not more than that—a charge for work which was never done.]

The solicitors honestly made out their bill in this way, considering that under the Act they had no option. The charge seems high; but the object of the Act and Rules was to give an average. In some cases the percentage gives an unreasonably large amount of remuneration for the work done; in others it gives as much too little.

COTTON, L.J.:—

This is an appeal by Messrs. *Lacey & Son* from an order for taxation of their bill of costs, with a direction that the scale contained in the General Orders under the *Solicitors Remuneration Act*, 1881, does not apply. The appeal is based on two grounds; first, that the Judge was wrong in saying that the new scale does not apply; and, secondly, that the bill could not be taxed at all, for that it had been paid, and there were no special circumstances to authorize a taxation. In the view we take of the case it is not necessary to decide whether the new scale applies, but as the point has been fully argued and is of general importance, we will give our opinion upon it. We are of opinion that if the business done had been business within the description of the business to which Schedule I. applies, it would properly be charged for according to that schedule. But what has been done here is to make the *ad valorem* charge of 30*s.* per cent. which the rules authorize a vendor's solicitor to make "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)." In the present case there was no deduction

(1) 11 Beav. 319. (2) 10 Beav. 57.

of title, for the purchaser, when he gave notice of his intention to purchase, stated that he did not want an abstract. All that Messrs. *Lacey & Son* did was to peruse the two deeds sent them by the purchaser's solicitor, each being about twenty-eight folios in length, to procure their execution, and to attend the completion. For this business £16 10*s.* is charged in respect of one lot and £17 10*s.* in respect of the other. These charges appear to be largely in excess of what could reasonably be charged. In my opinion the rules do not authorize the charging the percentage there mentioned, unless the work there mentioned as being the work for which it is chargeable has in substance been done. I consider, therefore, that the percentage here claimed was not chargeable, but that the case is governed by rule 2 (*e*). "In respect of business not hereinbefore provided for, connected with any transaction the remuneration for which, if completed, is hereinbefore or in Schedule I. hereto prescribed, but which is not, in fact, completed . . . . and in respect of all other deeds or documents, and of all other business the remuneration for which is not hereinbefore, or in Schedule I. hereto, prescribed, the remuneration is to be regulated according to the present system as altered by Schedule II. hereto." In my opinion, then, as the work of deducing title has not been done, the case is one not provided for by Schedule I., and falls within Schedule II.

The bill, then, as it appears to me, contains serious overcharges, but in my opinion we cannot, without overruling the whole current of decisions, direct a taxation. After payment special circumstances are requisite to authorize taxation, and these special circumstances must be pressure and manifest overcharges, or overcharges so gross as to amount to fraud. It cannot be said that these are overcharges amounting to fraud, and I think that pressure is not shewn. The bill was delivered six weeks before the time fixed for completion, and though the time for completion was anticipated, that was at the desire of the purchaser, and the bill had been in his hands nearly a fortnight before the time of actual completion. Under these circumstances I cannot think that there was pressure. The cases nearest to the present are cases where the bill was not delivered till the time of completion, but that is a very different state of things. If when

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parties are met to complete, the bill is for the first time produced, and the solicitor refuses to allow the matter to proceed unless it is paid, that is pressure; but the case is quite different when sufficient time has been allowed to consider the bill. I am of opinion that the order of the Vice-Chancellor must be discharged.

Lindley, L.J.:—

The first question is, whether this bill can be taxed at all after payment; and, without attempting to define what are sufficient special circumstances to authorize a taxation, I agree that we cannot say that such circumstances exist here. The time fixed for completion was the 25th of March, but for the purchaser's convenience the purchase was completed on the 14th of February. The bill had been sent on the 2nd. These dates are sufficient to shew that there was no pressure, and the bill, therefore, is not liable to taxation.

This is all that it is necessary to decide; but a question of general importance has been argued on which we think it right to give our opinion. The bill is framed on the supposition that the new rules apply, and that supposition, I think, is right; but it is also framed on the supposition that Schedule I. applies, and that, in my opinion, is wrong. I think that the 30*s.* per cent. can only be charged in the case provided for, viz., where substantially the whole of the work mentioned, *i.e.* deducing the title and perusing and completing the conveyance, is done. The rules cannot, in my opinion, be construed as authorizing the solicitor to charge the percentage where he does nothing but peruse and complete the conveyance.

Fry, L.J.:—

I regret that I am compelled to concur in the conclusion that a taxation of this bill cannot be directed. The dates negative pressure, and, that being so, there are no special circumstances to justify an order for taxation.

As to the other question, I concur in the opinions which have been already expressed. I think that the solicitors made out their bill on a wrong footing. They assumed, and I think correctly, that the new rules were applicable. But Schedule I. only

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applies where substantially all the things for which the percentage is chargeable are done. The clause of Schedule I. which bears on the present case mentions four things—deducing the title, perusing the conveyance, completing the conveyance, and preparing contract or conditions of sale. It is not necessary in order to enable the solicitor to make the charge, that a contract or conditions should be prepared, the schedule saying that the work for which the charge is made includes the preparation of the contract or conditions, "if any;" but in my opinion the charge cannot be made unless the other three things are done. Here an important part of the business specified was not done. I think, therefore, that Schedule I. is not applicable, and that under rule 2, sub-sect. (*c*), the remuneration of the solicitors was regulated according to the old system as modified by Schedule II. I am of opinion, therefore, that the bill was framed on an erroneous footing, but as we have no jurisdiction in the absence of special circumstances to order taxation after payment, the order of the Vice-Chancellor must be discharged.

Solicitors for *Lacey & Son: Todd & Dennes.*
Solicitor for Respondent: *J. B. Ottley.*

H. C. J.

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June 4.
C. A.
Dec. 14.

Fraudulent Preference—"Suffering Judicial Proceeding"—Non-appearance to Writ—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 92.

A debtor failed to enter an appearance to a specially indorsed writ served on him by his father-in-law. Judgment was signed on the 15th of May (the earliest day possible), a writ of *elegit* was issued the same day, and on the 16th of May the sheriff seized the Defendant's goods. The inquisition was held on the 19th of May, and the goods were delivered to the Plaintiff in part satisfaction of his debt. On the 22nd of May the Defendant filed a liquidation petition, and his statement of affairs shewed that his debts were £6542, and his assets £607. He had committed no act of bankruptcy before the filing of the petition. He had before the writ was issued been advised by a solicitor, who acted for the father-in-law, and who issued the writ and signed the judgment on his behalf. The debtor also consulted that solicitor after the issue of the *elegit*, and that solicitor filed the petition for him. The trustee in the liquidation claimed to set

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aside the judgment and the subsequent proceedings under it as a fraudulent preference:—

Held, that, though the circumstances were suspicious, yet, having regard especially to the fact that, when the transactions took place, no creditor was in a position to take proceedings in bankruptcy against the debtor, he not having committed any act of bankruptcy, the trustee had failed to prove that the debtor had allowed judgment to go against him by default with the view of preferring the father-in-law.

CHARLES MARSDEN was an hotel-keeper at *Barnsley*. He had received large advances by way of loan from *William Turner*, who was his wife's father. In April, 1882, he was in pecuniary difficulties, and by the advice of *Turner* he consulted Mr. *Herbert Bramley*, a solicitor at *Sheffield*, who was *Turner's* solicitor, *Turner* promising to pay the expense of his doing so. On the 6th of May, 1882, *Bramley*, by the direction of *Turner*, issued a writ against *Marsden* in the Queen's Bench Division. The writ was specially indorsed, and it claimed the payment of £2500, a part of the debt due by *Marsden* to *Turner*, and £640 7*s.* 5*d.* for interest. The writ was served on *Marsden* the same day. On the 8th of May *Marsden* wrote a letter to *Bramley*, in which he entered into explanations as to the state of his affairs, and concluded by saying, "I shall now wait instructions from you and Mr. *Turner* as to what steps I shall take in the matter." On the same day *Bramley* replied, "In view of your difficulties, and the likelihood of your being sued by others, Mr. *Turner*, by my advice, has sued you, and means to get judgment. This is done to protect himself, and you must take such steps as you consider right. He does not intend, if possible, that any other creditor should get before him." *Marsden* had an interview with *Bramley* on the 10th of May. At this interview a shorthand writer was present, and, according to his notes, the substance of what passed was as follows: "*Marsden* said he was in a difficulty, he did not know what to do, and he had come to see if he could get any advice. Mr. *Bramley* said: I have thought it desirable that I should only represent Mr. *Turner*; I mean to get judgment for Mr. *Turner* as soon as ever I can; I can get judgment next Monday. If you enter an appearance you delay us, but not very long. Mr. *Turner* does not say a word to you not to delay us. I have advised him to put himself in a better position than any

one else. You cannot prevent Mr. *Turner* getting judgment. I do not mean to arrange with you in any way. It is open to you to do as you please, but I want to be in first. We must leave ourselves to be dealt with as you deal with us. I cannot enter into a bargain with you. Really I am threatening you. I am acting as a harsh creditor, and I intend for the present to do so. I won't say a word to influence you one way or the other. You must take your own course. If you consult a solicitor you had better shew him my letter." *Marsden* did not consult any other solicitor, and no appearance was entered on his behalf to the writ. On the 15th of May (the first day possible) judgment was signed by *Bramley* on behalf of *Turner* for £3143 2*s.* 2*d.* debt, and £4 15*s.* 8*d.* costs. The same day a writ of *elegit* was issued on the judgment, and was delivered to the sheriff, who on the 16th of May seized *Marsden's* goods. On the 19th of May an inquisition was held, and the goods which had been seized were valued by the jury at the sum of £1983 18*s.*, at which price they were then delivered by the sheriff to *Turner*, in part satisfaction of his debt. On the 22nd of May *Marsden* (by *Bramley* as his solicitor) filed a liquidation petition in the *Barnsley* County Court. He had not previously committed any act of bankruptcy. By the statement of his affairs, which he produced at the first meeting of his creditors, it appeared that his debts amounted to £6542 6*s.* 5*d.*, and that his assets were valued at £606 19*s.* 10*d.* The creditors resolved on a liquidation by arrangement, and appointed a trustee. The trustee applied to the County Court for an order declaring that the judgment signed by *Turner* and the subsequent proceedings under it were fraudulent and void as against the trustee under sect. 92 of the *Bankruptcy Act*, 1869.

The debtor was examined, and in the course of his examination he said that he was very much surprised when the writ was served on him, but he did not believe that his father-in-law would proceed to extremities, and he still thought that he would not have done so if Mr. *Bramley* had not advised him to do it. The debtor denied that he waited to file his petition until his father-in-law had got judgment. Other writs were served on him, and he did not know what to do. He consulted Mr. *Bramley* after the *elegit* proceedings and he told him that he had no choice but to file his petition.

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The judge of the County Court was of opinion that the circumstances were suspicious, and that the trustee was justified in taking proceedings to have the transactions investigated. But his Honour was of opinion that the evidence failed to establish that there had been a fraudulent preference of the father-in-law. The application was therefore refused, but without costs.

The trustee appealed to the Chief Judge. The appeal was heard on the 4th of June, 1883.

West, for the Appellant:—

The act of the debtor in suffering judgment by default amounts to a fraudulent preference within sect. 92 of the *Bankruptcy Act*, 1869. There was collusion between the debtor and his father-in-law to benefit the latter at the expense of the other creditors.

The debtor was in a state of insolvency to the knowledge of the father-in-law. The action was concerted between them. It was the same thing as if the debtor had executed a deed in favour of his father-in-law. There was no difference between the two proceedings, if the debtor knew what the effect of an *elegit* would be. He must be taken to have known the reasonable result of his own actions.

Then the petition is filed by the solicitor of the judgment creditor. The motive is obvious. The solicitor says, in effect, to the judgment debtor, "You see what harsh creditors we are; we mean to be paid; you can defend the action if you like; we advise you not to do so; it will be against your interest; if you put off the defence until the judgment creditor has got his judgment and *elegit*, he will be able to carry off everything under the writ."

The motives of the parties can be sufficiently inferred from their acts, and their intention clearly was to defeat the other creditors.

Winslow, Q.C., and *Herbert Reed*, for the father-in-law, were not called upon.

BACON, C.J.:—

This case has occupied the greater portion of two days. Mr. *West's* argument has been compressed within very reasonab

limits, but the reading of what is called the evidence has occupied the best part of a day, and after the case has been stated and commented upon, it is found that there is not a single fact in dispute; not a contradiction—not an act done to which any suspicion attaches. Then I am invited to assume that an imaginary conversation took place between the father-in-law of the debtor and Mr. *Bramley*, and that they laid their heads together and concocted a plot whereby the general creditors should be defeated for the benefit of the father-in-law, who was a large creditor. This I cannot do. The ingenuity of counsel, if he were addressing a jury, might possibly meet with more success than it will with me, when I am asked to imagine a conversation for the occurrence of which there exists not a particle of evidence.

The story is a very plain one. The father-in-law, a man of property, had lent money from time to time to his son-in-law, who was carrying on business. He had reason to believe that the son-in-law was being pressed by a number of debts—one of which, due to a firm of bankers, may for the present, by common consent, be laid out of the question—at any rate, it is a disputed debt. Under these circumstances the father-in-law consults his solicitor, who says to him,—"From what I have heard, I think it probable that your son-in-law is in a state of insolvency—he is pressed by debts which he cannot pay—he owes a great deal of money to you as well as to others—you must bestir yourself, and resort to all the remedies the law gives you, and take care that others who have no better claim than yourself do not come in and share the proceeds out of which you have a right to demand payment." That is the result of the evidence. The father-in-law, the solicitor, and the debtor, are all agreed as to this state of things. Then an accountant is sent over to examine the books, and Mr. *Bramley*, the solicitor, who had a duty to discharge to his client, takes the precaution of sending with the accountant, or while he was there, a writ commencing an action for the recovery of the debt. Was there anything unlawful in that? If I lay aside the imaginary dramatic scene, which Mr. *West* in the latter part of his argument presented to me, there is not the slightest ground for saying that anything was intentionally done by the father-in-law, advised by the solicitor, or known and submitted to by the debtor, which

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was wrong or immoral in itself, or known by them to be so. The writ is issued, and an explanation of the proceeding is given. More honest and plain advice could not have been given than seems to have been given by Mr. *Bramley* on this occasion. He says to the debtor, "I have brought an action against you; you may defend it or not, as you please; I mean to get paid if I can, by force of that action; you may defend it or not, as you please, but if you do we shall nevertheless insist on payment." A more honest and distinct statement than that can hardly be imagined.

I am invited to consider the 92nd section, which declares, amongst other things, that if a debtor suffers any process to go against him with intent to prefer a creditor, his act in that respect, whatever it is—the words are very comprehensive—shall be entirely void. But the principle must be kept in view that every creditor has a right to resort to all lawful means of compelling payment of his debt, and moreover there is an express enactment that, if the transaction be without fraud, and for valuable consideration, the previous part of the section shall not apply.

In my opinion the evidence is clear, conclusive, and uncontradicted, that what the father-in-law did was for good consideration and without taint of suspicion. Indeed the argument has hardly imputed anything improper to him. The argument addressed to me has been, "You must infer that this man suffered judgment to be recovered and execution to go against him for the purpose of preferring his father-in-law." For that view, there is, as I have said, in my opinion, no kind of support, and if it were acceded to, the Court would be going much further than a jury would be likely to go, however eloquently they might be addressed.

I should not like to hold that it is the duty of a debtor, who is threatened by a clamorous creditor, invariably to resist, and that if he does not do so, he commits an act of bankruptcy—for that is what it comes to—if this transaction be declared void.

I think there is no ground whatever for the application, and the appeal must be dismissed with costs.

J. B. D.

C. A. From this decision the trustee appealed. The appeal was heard on the 14th of December, 1883.

Aspland, for the Appellant:—

The omission to appear to the writ was a "suffering of a judicial proceeding," within the meaning of sect. 92 of the *Bankruptcy Act*, 1869: *Ex parte Richardson* (1); and under the circumstances it is plain that this was done with the view of preferring the father-in-law. The intention must be inferred from the acts: *Freeman* v. *Pope* (2); *Cumming* v. *Baily* (3).

[COTTON, L.J.:—How does it appear that, if an appearance had been entered to the writ, there would have been an act of bankruptcy before the father-in-law could have got judgment and seized the goods? You say the debtor delayed filing his petition until his father-in-law was safe. But, there being no act of bankruptcy, no other creditor was in a position to take bankruptcy proceedings.]

It is sufficient if the preferring of the father-in-law was the debtor's substantial or dominant motive in suffering judgment to go by default: *Ex parte Hill* (4).

Winslow, Q.C., and *Herbert Reed*, for the father-in-law, were not heard.

COTTON, L.J.:—

In my opinion the Appellant has not made out his case. He seeks to impeach as a fraudulent preference a judgment suffered to be taken in default of appearance by the debtor, the Plaintiff in the action in which that judgment was obtained being the debtor's father-in-law. Now, undoubtedly the circumstances of the case are suspicious. There can be no doubt about that. The debtor, who had obtained considerable advances from his father-in-law, was in very bad circumstances, and was consulting a solicitor, who was his father-in-law's solicitor, because his father-in-law had practically said, "You may go to him at my expense and on my account." Then, after a meeting, when it was pretty clear that he was in a very bad way, the father-in-law consulted

(1) Court of Appeal, August 3, 1882, unreported.
(2) Law Rep. 5 Ch. 538.
(3) 6 Bing. 363.
(4) 23 Ch. D. 695.

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the solicitor as his solicitor, and then he took proceedings in order to obtain judgment, and undoubtedly with the object of making himself secure, knowing that the son-in-law was insolvent and could not pay his creditors; that is, I think, undoubted. But what we have to consider is—not what the object of the father-in-law was—but whether the son-in-law acted as he did in order to give his father-in-law a preference. The words of the statute are, "with a view to giving such creditor a preference over the other creditors." That must mean that it is done substantially with the object of giving a preference. Now, was that so here? I am very much pressed by this, that, at the time when the action was commenced by the father-in-law, there was no other creditor who was in the position of being able to take proceedings in bankruptcy against the debtor. If there had been, the case might have had a very different aspect; but, there being no other creditor in such a position, the debtor goes to Mr. *Bramley*, the solicitor of his father-in-law, who had commenced the action, and who was fully alive to the difficulties of his position; and Mr. *Bramley* tells him "I cannot advise you what to do; you must do what you think right." Then the debtor was asked in examination, "Why did you not enter an appearance to this writ?—why did you not appear?" "Well," he said—and I do not think it is a very unreasonable explanation—"I did not think my father-in-law would proceed to extremities, that he would do what he ultimately did, issue execution and carry off these goods. I trusted him, and I was quite willing to trust him, to do what he thought best for my benefit." In order to shew that the judgment was suffered with the view of giving the father-in-law a preference, it is not sufficient to shew only that the debtor did not enter an appearance, and that he in that sense suffered the judgment, but it must be shewn that he abstained from entering an appearance with the view of giving his father-in-law a preference. Now undoubtedly it is suspicious that he should go to Mr. *Bramley*, who was his father-in-law's solicitor, and that he did not go to any one else; but, having regard to the position of the Plaintiff in the action and the debtor, I cannot think that the proper inference to be drawn from the evidence is that the debtor did what he did in order to give his father-in-law a

preference over the other creditors. This being a matter which it is for the Appellant to make out—not, of course, conclusively, but so as to satisfy us—in my opinion he has failed to discharge the *onus*, and the appeal must be dismissed.

LINDLEY, L.J.:—

I also am of opinion that the view taken first of all by the County Court Judge, and afterwards by the Chief Judge, of the facts of this case, is correct. I think Mr. *Aspland* has laid the facts before us in a very clear and intelligible way. That the case is a suspicious one is obvious, and it was quite right for the trustee to have it investigated in the County Court. But, when we come to sift it, it appears to me to break down just at the critical point, because it has to be proved that the debtor failed to defend the action with a view of giving his father-in-law a preference. I confess I do not think that he did so with that view. I am satisfied that Mr. *Turner* was in very able hands. Mr. *Bramley* knew perfectly well what he was about, and saw the difficulties of his position. But to my mind it is quite plain that there was nothing like any secret understanding or collusion between the debtor and Mr. *Turner* or his solicitor; that Mr. *Bramley* was far too wary to admit of even the suspicion of such a thing. He piloted his skiff with great skill, and I am satisfied that there is nothing of the kind either concealed or to be discovered in any way. The true explanation of it, I think, is this, that the debtor hoped on to the last, and never did believe that his father-in-law would seize his goods, until they were in fact seized. When they were seized he was in this difficulty, that there was no occasion for him to present a petition against himself, and, if he had not done so, this question never could have arisen, because a considerable time must have elapsed before any one else could have presented a petition, or obtained an order of adjudication. But, when he found that his father-in-law really was in earnest, and that Mr. *Bramley*, the solicitor of his father-in-law, had seized all his goods, he began to feel the position in which he was. He did not know what was best to do for himself, and he presented his petition. I am satisfied that there was nothing like collusion or anything of the sort, and that, however suspicious the case may

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be, it is, when fully investigated, on the safe side, and that the view taken by the County Court Judge and the Chief Judge is correct.

FRY, L.J. :-

I am of the same opinion.

Appeal dismissed with costs.

Solicitors for trustee: *Wilkinson & Son*, agents for *Dibb & Clegg, Barnsley.*

Solicitor for the father-in-law: *H. Montagu*, agent for *H. Bramley, Sheffield.*

W. L. C.

C. A. 1883 KAY, J. *Dec.* 13. C. A. *Dec.* 17.

ISLE OF WIGHT RAILWAY COMPANY *v.* TAHOURDIN.

[1883 I. 1864.]

Railway Company—General Meeting of Shareholders—Form of Requisition to call a Meeting—Power to remove Directors—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *ss.* 70, 88, 89, 91 [*Revised Ed. Statutes, vol. ix. pp.* 576, 579, 580].

A sufficient number of shareholders required the directors of a railway company to call a meeting of the company for the following objects: 1. To appoint a committee to inquire into the working and general management of the company, and the means of reducing the working expenses, to empower such committee to consolidate offices, to remove any of the officers and appoint others, and to authorize and require the directors to carry out the recommendations of the committee; 2. To remove, if deemed necessary or expedient, any of the present directors, and to elect directors to fill any vacancy in the board. The directors issued a notice for a meeting "for the purpose of considering and determining upon a demand of the requisitionists for the appointment of a committee to inquire into the working and general management of the company and the means of reducing the working expenses." The requisitionists gave notice that they should not attend the meeting, as the notice did not provide for all their objects, they did not attend, and they then themselves issued a notice under sect. 70 of the *Companies Clauses Act*, calling a meeting for the purposes mentioned in their requisition. The directors brought an action in the name of the company to restrain the requisitionists from holding the meeting:—

Held, by *Kay*, J., that everything in the first part of the requisition beyond the appointment of a committee was illegal, for that it proposed to

transfer the powers of the directors to a committee, and that the directors were therefore justified in not entertaining the latter part of the first head of the requisition:—

Held, also, by *Kay*, J., that the second head of the requisition was too vague and did not "fully express the object of the meeting," and that the directors had no power to call a meeting for that purpose, whether a general meeting had power to remove directors or not:—

Held, therefore, by *Kay*, J., that the directors had not failed to call a meeting within the meaning of the *Companies Clauses Act*, 1845, s. 70, that the power of the shareholders to call it had therefore not arisen, and that an injunction must be granted.

Held, on appeal, that all the objects of the first part of the requisition were objects that could be carried out in a legal way, that the Court will not restrain the holding of a meeting because the notice calling it is so expressed that consistently with its terms resolutions might be passed which would be *ultrà vires*, and that the directors were not justified in excluding from their notice the objects in the first part of the requisition other than the appointment of a committee:—

Held, also, that under sect. 91 of the *Companies Clauses Act* a general meeting has power to remove directors, that a notice of a proposal to remove "any of the directors" was sufficiently distinct, that the general meeting could at all events fill up vacancies in the board if all the directors were removed or if the directors declined to exercise the power given by sect. 89, and that the directors were therefore bound to include in their notice the objects mentioned in the second part of the requisition:—

Held, therefore, that the requisitionists were entitled to call a meeting, and that the injunction must be discharged.

THE *Isle of Wight Railway Company* is a company incorporated by Act of Parliament and subject to the provisions of the *Companies Clauses Act*, 1845. The special Act of the company did not contain anything as to removal of directors by the company.

On the 20th of October, 1883, the requisite number of shareholders under the power given by clause 70 of the *Companies Clauses Act*, sent a requisition to the directors to call an extraordinary meeting of the company for the following objects:

"1. To appoint a committee to inquire into the working and general management of the company, and the means of reducing the working expenses. To empower such committee to consolidate all or any of the duties of secretary, general manager, accountant, and cashier, and to concentrate the offices in the Island, and to remove any of the officers or servants of the

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company and appoint others, and to authorize and require the directors to carry out the recommendations of the committee.

"2. To remove (if deemed necessary or expedient) any of the present directors, and to elect directors to fill any vacancy in the board."

On the 9th of November, 1883, the directors issued the following notice to the shareholders.

"The directors of the company having received a requisition from certain shareholders to convene an extraordinary meeting of the company, I am directed to give you notice that an extraordinary general meeting of the proprietors of the *Isle of Wight Railway Company* will be held at &c., on Tuesday the 27th of November, 1883, at two o'clock in the afternoon, for the purpose of considering and determining upon a demand of the requisitionists for the appointment of a committee to inquire into the working and general management of the company and the means of reducing the working expenses."

This notice was accompanied by a circular in which the directors said, "We are advised that several of the proposals of the requisition cannot legally be submitted to an extraordinary meeting of shareholders, but desiring to avoid controversy on technical grounds we have determined to call a meeting to discuss and determine whether or not a committee shall be appointed as demanded by the requisition, and a notice summoning a meeting for the 27th inst. will be issued."

The meeting was held on the 27th and the appointment of a committee was negatived. The requisitionists had in the meantime given notice to the directors that they should not attend the meeting as the notice convening it did not provide for all their objects, and none of them did in fact attend it.

On the 4th of December, 1883, the Defendants and other shareholders making up the prescribed number issued a notice under sect. 70, calling a meeting for the purposes therein mentioned, being the purposes set forth in the original requisition, and expressed in the same terms.

On the 10th of December this action was commenced in the

name of the company, asking a declaration that the Defendants and the other persons who had signed the notice of the 4th of December, purporting to be a notice convening a meeting of the company for the purposes therein mentioned, were not entitled to summon or hold a meeting of the company for such purposes or any of them, and an injunction to restrain the Defendants from representing that any meeting held in pursuance of that notice would be a duly constituted meeting of the company, or that any resolutions passed thereat would bind the company, and from holding such meeting or passing resolutions thereat as or for meetings or resolutions of the company, or otherwise than as meetings or resolutions of the individual shareholders who might be present thereat.

The motion was made before Mr. Justice *Kay* on the 13th of December, 1883.

Hastings, Q.C., and *W. P. Beale*, for the motion, referred to the *Companies Clauses Act*, 1845, ss. 70, 88, 89 and 91, and submitted that even assuming there was a power to remove directors, the course taken by the Defendants was not a proper one. Where the company had the power to remove directors, it must be exercised at a properly constituted or general meeting of the company. What the Defendants proposed to do would be illegal acts, and the directors were acting rightly in bringing the action to restrain them from doing those acts. The requisitionists could not do what was proposed under sect. 70 of the Act because the directors had not failed to call a meeting, and the requisitionists could only call a meeting after the directors had refused to do so. If a director went out of office *ad interim*, the remaining directors had power to elect in his place under sect. 89, and such director would continue in office so long only as the predecessor would have remained in it.

They referred to *Imperial Hydropathic Hotel Company, Blackpool* v. *Hampson* (1) and to *Hattersley* v. *Earl Shelburne* (2), and submitted that the latter case went no further than that Vice-Chancellor Sir *R. Kindersley* would not interfere, but left the shareholders to deal with the directors at an ordinary meeting.

(1) 23 Ch. D. 1. (2) 31 L. J. (Ch.) 873.

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It would be most inconvenient if the Court should hold that the proposed meeting could displace the directors and appoint others in their places; and they submitted that an injunction should be granted as asked for.

J. Shiress Will, and *Graham Tahourdin*, for the Defendants, submitted that the motion should be refused. Sect. 68 of the Act of 1845 answered the objection to the course proposed that the meeting would not be a general meeting of the shareholders, and sect. 69 shewed what business must be transacted at the meeting. The meeting had, under sect. 70, been lawfully convened. There was express power given in the *Companies Act*, 1862, Table A, clause 65, to remove a director, and sect. 83 of the Act of 1845 was conclusive on the point. Directors were to continue in office subject to the power of removal, and it did not depend upon the special Act; and sect. 91 shewed how the company were to exercise their powers. Directors were delegated agents with authority under the statute, but there was nothing to take away the common law right to remove them. It should not be assumed that the meeting to be held on the 19th of December would act in an unlawful manner. When constituted the meeting might lawfully delegate power to a committee if thought fit. Directors were only delegates, but the shareholders were principals, and they should not be prevented from holding their meeting, which they proposed to do in a lawful manner.

KAY, J.:—

The material facts in this case are few. A requisition was signed by some twenty-two shareholders to the directors of this company asking them (1) to call a meeting to appoint a committee to inquire into the working and general management of the company, and the means of reducing the working expenses, to empower such committee to consolidate all or any of the duties of secretary, general manager, accountant, and cashier, and to concentrate the offices in the island, and to remove any of the officers or servants of the company and to appoint others, and to authorize and require the directors to carry out the recommendations of the committee; (2) "to remove" (this, I understand,

does not mean that the committee shall remove, but that the meeting shall remove) "if deemed necessary or expedient, any of the present directors, and to elect directors to fill any vacancies in the board." Upon that requisition being sent to the directors they, on the 9th of November, 1883, issued a notice to convene a meeting for one of the objects only. It was in effect that the directors of the company having received a requisition from certain shareholders to convene an extraordinary meeting of the company they gave notice that an extraordinary general meeting of the proprietors of the company would be held, at the place named, on the 27th of November, 1883, "for the purpose of considering and determining upon a demand of the requisitionists for the appointment of a committee to inquire into the working and general management of the company and the means of reducing the working expenses." The meeting was held on the 27th of November, but previously thereto there had been a communication from the requisitionists to the directors, stating that they should abstain from interfering at the meeting because it would not carry out their objects. Accordingly the meeting having been duly held, and the particular requisition negatived, the shareholders—there is no question as to their numerical competency — under the *Companies Clauses Consolidation Act*, 1845, issued a notice of their own convening a meeting for the purposes expressed in their original requisition to the directors, including that for which the meeting had already been held—that is, they ignored entirely that meeting and, treating themselves as empowered to do so by the refusal of the directors, summoned another, which was to be held for all the objects in the original requisition. The main question is whether that was legal. The directors were advised that the requisition was improper as to everything except the first sentence, and therefore they summoned a meeting for the purpose of considering that only, but the rest they would not entertain. If they took that course properly, and if the rest was illegal, then it is plain that they have not refused to summon a proper meeting, and therefore the power of the shareholders to summon a meeting did not arise at all. The whole question comes to this: were the other objects expressed in the requisition such as the shareholders were entitled

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to require the directors to summon a meeting for, and if they did not do so, could they summon a meeting themselves?

The second part of the requisition was to "empower such committee," who were to be appointed to inquire, &c. [His Lordship read the words of the requisition down to the 2nd.] The simple question is, would it or would it not be within the right of a general meeting to empower a committee to do all these things? In my opinion it clearly would not be. It would be to displace the directors, and to transfer to a committee to be appointed the functions of the directors to a very considerable extent. It seems to me that a general meeting has no power whatever to give any authority of that kind to a committee. It has been ingeniously argued that I must not assume that the requisition means what it says, but that I must assume that it would be put to the meeting as a matter for it to decide, whether these offices should be in fact consolidated, and so on, but my answer is simply, that is not the language of the requisition. The meeting is not, according to the requisition, summoned for the purpose of determining whether the offices shall be consolidated, which might or might not be perfectly legal, and upon which I give no opinion, but is summoned for the purpose of appointing a committee, to which committee the power of doing that is thereupon and at once to be given. Clearly to my mind it would be entirely illegal to attempt to give such a power to a committee so appointed. The rest of the requisition is [His Lordship read it]. I am not going to determine upon this occasion whether a meeting has power or not to remove directors. That is a question which deserves consideration. The special Act contains, I understand, no power to remove directors, but it was said that it is to be implied from the language of sects. 83 and 91 of the *Companies Clauses Consolidation Act*, 1845, that such a power of removal exists. No doubt those sections refer to a power of removal if such a power exists, but certainly in express terms they do not confer any such power. The Act was passed for the purpose of putting all the clauses which were commonly put into railway and canal Acts in the best possible form, and to enable railway and other public companies to incorporate them with their special Acts without re-enacting them. The Act of 1845 necessarily, as the

preamble and every part of it shews, pre-supposes the existence of a special Act which may contain a power to remove directors in which case sects. 83 and 91 would refer to that power. But it seems to me that it is not necessary in this case to determine that question, and I do not intend to determine it until it arises in a proper form. There is another, and to my mind a completely fatal, objection to that part of the requisition. Sect. 70 of the Act of 1845 provides that a requisition calling a meeting shall fully express the objects of the meeting. Did this part of the requisition fully express the objects. It said: "To remove, if deemed necessary or expedient, any of the present directors, and to elect directors to fill any vacancies in the board." It is not to remove *A.*, *B.* or *C.*, and I have not the smallest reason for supposing that any particular director has even personal notice that he was to be removed, or that the resolution would be to remove him. But, quite apart from that, how were the shareholders to know what director it would be proposed to remove. It is not said to remove all of them. That would have been quite a different thing. It is to remove any of them, and it does not say which. It is as vague and indefinite as it can possibly be, and therefore it seems to me that the directors were quite right in saying that they had no power to summon a meeting for any such vague purpose as that, and consequently they declined to do so, and it also seems to me that these shareholders were quite wrong in thinking that their power of summoning a meeting had arisen by reason of the refusal, as alleged, of the directors. The consequence is, that I must treat the meeting called for the 19th of December as one which could not be legally summoned as a meeting of the company. Therefore I ought to grant an injunction, and it will be simply an order to prevent the meeting being held.

T. F. M.

C. A.

The Defendants appealed, and the appeal was heard on the 17th of December, 1883.

J. Shiress Will, and *Graham Tahourdin*, for the Appellants:—

Under sect. 91 the company has power to interefere with the proceedings of the directors, and we submit, if it were neces-

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sary to argue the point, that there would be no objection to a general meeting interfering with them through the intervention of a committee. The proper construction of the notice, however, is that a committee is to be appointed which is to make a report to the shareholders on which they at a general meeting may act as they think fit. There is, therefore, no objection to the legality of the notice as regards the appointment of a committee. The other point is whether it is *ultrà vires* of a general meeting to remove a director. There is no express enactment on the subject, but sect. 91 appears to contemplate removal: see also sect. 83; and the decision in *Hattersley* v. *Earl Shelburne* (1) partly proceeded on the ground that the shareholders could remove directors. Assuming then that there is such a power, the question is whether the notice can be said to "fully express the object of the meeting" (sect. 70) with sufficient distinctness. Mr. Justice *Kay* thought that the directors whom it was proposed to remove ought to have been named, but after notice to remove any of the present directors nobody could be taken by surprise, no director could come to the meeting and say, "I was not aware that my conduct was going to be impeached." As to appointing new directors in the room of those removed, sect. 89 gives the board a power of filling up vacancies, but does not appear to contemplate a removal. Moreover, if any directors here were removed there would be less than a quorum, and in such a case the shareholders must have power to fill up the vacancies at a general meeting.

Hastings, Q.C., and *W. P. Beale*, *contrà*.

[COTTON, L.J.:—Is it not within the power of the meeting to appoint a committee to report, not directing them to carry their recommendations into effect without the sanction of a future meeting?]

Nobody would have objected to that, but the notice does not stop there, it proposes that the committee should do the things, and this is *ultrà vires*. Then as to removal of directors, the notice is too vague, it ought to specify the individuals when the question is as to removing them for misfeasance. A notice to remove some or one of them is not reasonably distinct. Then as

(1) 31 L. J. (Ch.) 873.

to the election of new directors, the power to fill up vacancies from any cause other than going out of office by rotation is, under sect. 89, in the board.

[FRY, L.J.:—Suppose all were removed?]

Then there is no power anywhere to fill up the vacancies.

[FRY, L.J.:—That is an argument against your view.]

Sect. 89 is express.

[COTTON, L.J., referred to sect. 90.]

That does not relate to the same subject-matter as sect. 89.

[COTTON, L.J.:—Ought we to stop a meeting because the notice convening it is expressed in terms so wide as to include some things which cannot legally be done at the meeting?]

The notice of the directors, as we contend, includes everything in the requisition which could legally be submitted to an extraordinary meeting, it was therefore sufficient, and the requisitionists never acquired the right to call a meeting.

COTTON, L.J.:—

We are of opinion that this injunction ought not to have been granted. It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere, if the majority of them think that the course taken by the directors, in a matter which is *intrà vires* of the directors, is not for the benefit of the company.

Certain shareholders in this company who had power to require the directors to call a meeting sent them a notice under sect. 70 of the *Companies Clauses Act*, requiring the meeting to be called. The notice stated two separate objects. One was to appoint a committee to inquire into the working and general management of the company, and to empower the committee to do certain things and to authorize and require the directors to carry out the recommendation of the committee. The second was to remove, if deemed necessary or expedient, any of the directors, and fill up the vacancies. The directors instead of sending out the notice in that form, which would have left the meeting when called at

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liberty to enter into any of the questions mentioned in the notice, thought fit to send out a notice calling a meeting solely "for the purpose of considering and determining upon a demand of the requisitionists for the appointment of a committee to inquire into the working and general management of the company, and the means of reducing the working expenses."

Now sect. 70 requires that the requisition shall fully express the object of the meeting required to be called, and when the meeting is called, then, under sect. 69, the meeting cannot enter upon "any business not set forth in the notice upon which it shall have been convened." Therefore the meeting if it had met on the notice issued by the directors, could not have considered the question of removing any of the directors; and, in my opinion, its powers would have been limited as regards the first requisition, because assuming that everything upon which the committee were intended to enter is included in the working and general management of the company, yet as the purpose stated in the notice was limited to the appointment of a committee, it would have been said at once that neither that meeting nor any adjournment of it could require the directors to carry out the recommendations of the committee. The ground on which the directors so limited their notice was (and that seems to have been adopted, so far as the first object goes, by the learned Judge) that everything proposed by the requisition beyond the appointment of a committee was illegal, and that therefore they were justified in not calling a meeting for the purpose of considering it. Now I am of opinion that if the object for which it is proposed to call a meeting is one which can be carried out in a legal way, then, although the notice may be so expressed that resolutions following its precise terms would be illegal, it is not right for the directors to limit the notice so as to prevent the meeting from entering into the question simply because the terms of the notice would justify a resolution which would be *ultrà vires*. Directors have great powers, and the Court refuses to interfere with their management of the company's affairs if they keep within their powers, and if a shareholder complains of the conduct of the directors while they keep within their powers, the Court says to him, "If you want to alter the management of the affairs of the company go to a general meeting, and

if they agree with you they will pass a resolution obliging the directors to alter their course of proceeding."

In my opinion much of the criticism on the first part of this notice proceeds upon a misconstruction of the notice itself. The first part ends with "and to authorize and require the directors to carry out the recommendations of the committee." Now, having regard to the fact that this clause is introduced by the word "and" not "or," and to the words "authorize and require the directors to carry out the recommendations of the committee," I understand the notice as amounting to this, "We desire to have a committee appointed who are to inquire into the working and general management of the company, and the means of reducing the expenses, and to form a scheme as to consolidating the duties of secretary, general manager, accountant, and cashier, and concentrating the offices in the island, and as to removing any of the officers or servants and appointing others, and we desire that the directors should be authorized and required to carry out that scheme." I do not mean to give any opinion upon the question whether it would be legal to give to a committee power to do the things mentioned in the notice, it is unnecessary in my opinion to decide that question, as I am clear that such is not the object of the notice, for a scheme which the committee were intended to carry into effect of their own authority would not have been spoken of as "recommendations of the committee."

Now would it be right to pass a resolution requiring the directors to carry into effect the recommendations of the committee without their being submitted to a general meeting? I am inclined to think that it would not. It seems to me that the proper course would be to appoint a committee, and to require them to report to an adjourned meeting, which can consider the remaining point mentioned in the notice, viz., whether the directors shall not only be authorized, (which perhaps is unnecessary,) but be required, to carry out the recommendation of the committee. I think the right plan would be to appoint the committee, without giving any direction to the directors as to what they have to do until the report of the committee is before the general meeting. The adjourned special meeting, having undoubtedly a power to direct and control the

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board in the management of the affairs of the company, when they see what the committee recommend will say whether they will or will not require their board to carry those recommendations into effect. I do not mean to decide that this is the only legal course, but I point it out as being in my opinion the best and safest. In that way at all events this notice can legally be acted upon, and therefore as regards the first object the directors in my opinion were wrong in saying that they had given a sufficient notice. It follows from this that the requisionists were justified in calling this meeting.

Then there is a second object, "To remove (if deemed necessary or expedient) any of the present directors, and to elect directors to fill any vacancy in the board." The learned Judge below thought that too indefinite, but in my opinion a notice to remove "any of the present directors" would justify a resolution for removing all who are directors at the present time; "any" would involve "all." I think that a notice in that form is quite sufficient for all practical purposes. If when the recommendations of the committee were known, or when the committee had been appointed, the directors or some of them were to say, "We will not act any longer if you insist upon this. We will not follow out the recommendations whatever they may be," then very likely the general meeting would say, "If that be so we do not wish to have you as directors any longer, and we will remove you." That shews why the words "any of" were put in. If the committee make recommendations which are accepted by the company, some of the directors, though disapproving of them, may say, "We think this unadvisable, but as the company wishes it we submit to their wishes," and then very likely the meeting will say, "We will not remove those gentlemen, but we will remove those who at the meeting refuse to take the course which we consider conducive to the interests of the company." I am of opinion that under sect. 91 a general meeting of shareholders has power to remove directors, and that the notice was sufficiently distinct, and if so, the notice issued by the directors was insufficient in this respect also.

Then it is said that there is no power in the meeting of shareholders to elect new directors, for that under the 89th section the

power would be in the remaining directors. The remaining directors would no doubt have that power if there was a quorum left. But suppose the meeting were to remove so many directors that a quorum was not left, what then follows? It has been argued that in that case, there being no board which could act, there would be no power of filling up the board so as to enable it to work. In my opinion that is utterly wrong. A power is given by the 89th section to the remaining directors "if they think proper so do to," to elect persons to fill up the vacancies. I do not see how it is possible for a non-existent body to think proper to fill up vacancies. In such a case a general meeting duly summoned for the purpose must have power to elect a new board so as not to let the business of the company be at a dead lock.

In my opinion the notice which the directors issued did not properly comply with the requisition to call a meeting. The requisitionists, therefore, in my judgment, were justified in calling the meeting, and there was no ground for granting the injunction which has been granted.

LINDLEY, L.J.:—

I am of the same opinion. It appears to me that this case is very much more important than at first sight appears. It raises a question of the utmost possible consequence as to the management of railway and other companies. We must bear in mind the decisions in *Foss* v. *Harbottle* (1) and the line of cases following it, in which this Court has constantly and consistently refused to interfere on behalf of shareholders, until they have done the best they can to set right the matters of which they complain, by calling general meetings. Bearing in mind that line of decisions, what would be the position of the shareholders if there were to be another line of decisions prohibiting meetings of the shareholders to consider their own affairs? It appears to me that it must be a very strong case indeed which would justify this Court in restraining a meeting of shareholders. I do not mean to say of course that there could not be a case in which it would be necessary and proper to exercise such a power. I can conceive a case in which a meeting might be called under such a notice that

(1) 2 Hare, 461.

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nothing legal could be done under it. Possibly in that case an injunction to restrain the meeting might be granted. I do not say that it would, that case may be dealt with when it arises. In the present case it must be observed that the notice is not a notice of particular resolutions—it is a notice stating objects which the requisitionists wish to accomplish by any legal means. That is the only notice which they need give according to the terms of the Act of Parliament. One of their objects is to remove the directors. In my opinion, when we look at sect. 91 of the *Companies Clauses Act*, there can be no doubt that a general meeting has power to do this. The directors have issued a notice calling a meeting, but have excluded from their notice that object amongst others. That cannot be right. The other object of the requisitionists is to see whether they cannot economise by concentrating the offices and reducing their staff of officials. I quite agree that this notice is not happily worded, because it is capable of being construed so as to lead to the inference that they wanted to do this by delegating the powers of the company to a committee, the legality of which may be fairly questioned. But assuming that to be the true construction, it does not at all follow that under a notice of this kind a meeting would be precluded from passing resolutions substantially effecting the objects of the requisitionists in a way open to no objection on the score of illegality. It seems to me a very strong thing to say that the meeting shall not be held, because the notice is so wide that, according to its terms, illegal resolutions might be passed. I am of opinion that this injunction ought not to have been granted.

FRY, L.J.:—

I am entirely of the same opinion. If the object of a requisition to call a meeting were such, that in no manner and by no machinery could it be legally carried into effect, the directors would be justified in refusing to act upon it. But if the object stated in the requisition be such that by any form of resolution or by any machinery sanctioned by the Act, it can be carried into effect, then it is the bounden duty of the directors to call the meeting. I am bound to say that in this case the directors have,

in my opinion, been very ill-advised in not summoning a meeting to consider the whole of the objects which the requisitionists desired to lay before the meeting. The objection taken to the first part of the requisition is that it proposes to delegate to the committee powers which according to the statutory constitution of the company must be exercised by the directors. It appears to me that the requisition is not in any way open to that objection. I think that according to its true construction its object was the appointment of a committee to inquire into the affairs of the company, and to frame a scheme for the future management of the company, involving the removal of officers and the consolidation of offices and duties, and that it was intended to require the directors to carry that scheme into effect. So that the committee were, so to speak, to do the thing in idea: the directors were to do it in fact; and such a mode of procedure, if the scheme was sanctioned by an adjourned meeting or by a new general meeting, would be plainly, in my opinion, within the powers of the company.

The second objection was, that a requisition to call a meeting "to remove (if deemed necessary or expedient) any of the present directors" is too vague. I think that it is not. It appears to me that there is a reasonably sufficient particularity in that statement. It is said that each director does not know whether he is attacked or not. The answer is, all the directors know that they are laid open to attack. I think that any other form of requisition would have been embarrassing, because it is obvious that the meeting might think fit to remove a director or allow him to remain, according to his behaviour and demeanour at the meeting with regard to the proposals made at it.

Then with regard to the objection that a general meeting cannot elect directors to fill up vacancies, it appears to me that a general meeting would at any rate have that power in the event of all the directors being removed. In my judgment it is quite impossible to read the 89th section as the only section relating to the filling up of vacancies in the office of directors. That applies only where there are remaining directors, and those remaining directors think proper to exercise their powers. That does not, in my judgment, deprive the general meeting of the

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power to elect directors, where there are no directors, or where the directors do not think fit to exercise their powers. I think, therefore, that this injunction cannot stand.

Solicitors: *Tahourdins & Hargreaves; Beale, Marigold, Beale, & Groves.*

H. C. J.

C. A. 1883 Dec. 21.

Ex parte WARBURG.
In re WHALLEY.

Act of Bankruptcy—Debtor's Summons—Service—Time—Substituted Service—Bankruptcy Rules, 1870, *rr.* 59, 61.

Rule 59 of the Bankruptcy Rules, 1870, does not apply to substituted service of a debtor's summons, but, if personal service cannot be effected, an order for substituted service may be made under rule 61 after the expiration of the time limited by rule 59 for effecting personal service, and the substituted service must be effected within such reasonable time as the Court may fix (1).

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 22nd of March, 1883, Messrs. *Warburg & Dee* issued a debtor's summons against *G. W. Whalley*. Personal service not having been effected, an application for an order for substituted service was made on the 9th of April, but was refused on the ground that there was not sufficient evidence that the debtor was keeping out of the way to avoid service. The application was renewed upon further evidence on the 16th of April, and an order for substituted service was then made, and substituted service was effected accordingly. The debtor failed to comply with the summons within the time limited, and *Warburg & Dee* presented a bankruptcy petition against him, alleging as an act of bankruptcy the non-compliance with the summons. The petition was served on the debtor personally when he was on board a ship just starting for *America*. He gave no notice under rule 36 of the Rules of 1870 of his intention to shew cause against the petition, and it was heard in his absence. The Registrar refused to make

(1) See Bankruptcy Rules, 1883, rr. 122, 123, 144, 145.

an adjudication, on the ground that there had been no proper service of the debtor's summons, because the twenty-one days limited by rule 59 (1) for the personal service of a debtor's summons had expired when the order for substituted service was made, and no extension of the time for service had been granted by the Court. The petitioning creditors appealed. Notice of the appeal was not in the first instance in any way served upon or given to the debtor. The Court of Appeal held that notice should have been served on the debtor, and they made an order for substituted service of notice of the appeal (*vide Ex parte Warburg* (2)).

Service having been effected as directed by this order, the appeal now came on again for hearing.

Cooper Willis, Q.C., for the Appellants:—

The Registrar has not construed the rules rightly. The provision of rule 61 that, "if personal service cannot be effected," the Court may direct substituted service, necessarily implies that an order for substituted service may be made after the expiration of the time limited for effecting personal service. Rule 59 has no application to substituted service.

The debtor did not appear.

COTTON, L.J.:—

I think the Registrar has been too cautious. I am of opinion that there is a good act of bankruptcy, and that an adjudication ought to have been made. The difficulty turns upon the

(1) Rule 59: "A debtor's summons shall be personally served within twenty-one days from the date of the summons, by delivering to the debtor a sealed copy of the summons."

By rule 61: "A debtor's summons or a petition shall be served upon the debtor by an officer or a bailiff of the Court, or by the creditor or his attorney; but, if personal service cannot be effected, the Court may grant extension of the time for service, or, if the Court is satisfied by affidavit that the debtor is keeping out of the way to avoid such service, it may order service to be made by delivery of the summons or petition to some adult inmate at his usual or last known place of residence or business, or it may order, in the case of a summons, that a notice of the granting of the summons, according to the form in the schedule, be gazetted, and that the publication of such notice in the *Gazette* shall be deemed to be service on the debtor on the seventh day after such publication."

(2) 24 Ch. D. 364.

C. A. 1883 *Ex parte* WARBURG. *In re* WHALLEY. Cotton, L.J.

construction of rules 59 and 61, and I am of opinion that rule 59 applies only to the time within which personal service is to be effected, and that it does not apply at all to substituted service. I understand rule 61 to mean that, when personal service cannot be effected within the time mentioned in rule 59, the Court may extend the time for personal service. That does not apply at all to substituted service. Then the rule goes on, "or if the Court is satisfied that the debtor is keeping out of the way to avoid such service" it may make an order for substituted service, but no time is limited for the service. I am of opinion that substituted service is not within the direction as to time contained in rule 59, but that the Court when it makes an order for substituted service, either before or after the expiration of the time limited for personal service, must take care that it is effected within a reasonable time. I am of opinion that no restriction as to the time is contained in the rules. The order of adjudication must be made.

LINDLEY and FRY, L.JJ., concurred.

Solicitors: *Coburn & Young.*

W. L. C.

C. A. 1883

Ex parte FEWINGS. *In re* SNEYD.

C. J. B. *May* 11. C. A. *Nov.* 30; *Dec.* 1.

Covenant—Judgment—Merger—Mortgagor and Mortgagee—Costs—Liquidation Petition—Composition—Statement of Affairs—Time to which Interest on Debt should be calculated—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *rr.* 77, 92, 274—*Bankruptcy Forms*, 1870, *No.* 39.

A mortgage deed contained a covenant by the mortgagor for payment of the principal sum on the expiration of six months next after a specified day, together with interest thereon at 5 per cent. per annum for the six months. And there was a further covenant by the mortgagor that, if the principal sum, or any part thereof, should remain unpaid after the expiration of the six months, the mortgagor would, so long as the same sum or any part thereof should remain unpaid, pay to the mortgagee interest for the principal sum, or for so much thereof as should for the time being remain unpaid, at 5 per cent per annum. After the expiration of the six

months, the mortgagee recovered judgment against the mortgagor on the covenant for the principal sum and interest in arrear.

Held, that, the covenant being merged in the judgment, the mortgagee was, as from the date of the judgment, entitled only to interest on the judgment debt at the rate of 4 per cent., and was not entitled under the covenant to interest at the rate of 5 per cent. on the principal sum.

Decision of *Bacon*, C.J., reversed.

Popple v. *Sylvester* (1) distinguished.

In a debtor's statement of his affairs presented to the first meeting of his creditors under a liquidation petition under the *Bankruptcy Act*, 1869, he is bound only to shew the state of his affairs at the date of the filing of the petition, and is not, therefore, bound to calculate interest on interest-bearing debts beyond that date.

Costs and expenses properly incurred by a mortgagee in relation to the mortgaged property, and which the mortgagor will be compelled to pay as a condition of being allowed to redeem the property, do not constitute a debt in respect of which an action can be maintained by the mortgagee against the mortgagor.

ON the 15th of May, 1878, Mrs. *Nutting*, the widow and devisee of the Rev. *G. H. Nutting*, Rector of *Chastleton*, *Oxfordshire*, sold the advowson of the rectory of *Chastleton* to the Rev. *G. A. Sneyd* for the sum of £4200, of which £2000 was paid down, and the balance of £2200 was secured by a mortgage of the advowson to Mrs. *Nutting*.

The mortgage deed was executed on the same day as, but after the execution of, the conveyance to Mr. *Sneyd*, and by it, the advowson was granted to Mrs. *Nutting* by way of mortgage to secure the payment of £2200, with interest thereon at the rate of 5 per cent. per annum from the time when the living should first become vacant, and a sum of £50 per annum by way of interest until the first vacancy. The covenant for payment of the principal and interest was as follows: "And the said *G. A. Sneyd* doth hereby for himself, his heirs, executors, and administrators, covenant with the said *Mary Jane Nutting*, her executors and administrators, that he, the said *G. A. Sneyd*, his heirs, executors, or administrators, will, on the expiration of six calendar months next after the day on which the said living of *Chastleton* shall first become vacant, pay to the said *M. J. Nutting*, her executors, administrators or assigns, the sum of £2200, with interest for the same, after the rate of 5 per cent. per annum, computed from the

(1) 22 Ch. D. 98.

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day on which the said living shall first become vacant up to the expiration of such six calendar months. And further, that if the said sum of £2200, or any part thereof, shall remain unpaid after the expiration of six calendar months next after the day on which the said living shall first become vacant, he, the said *G. A. Sneyd*, his heirs, executors, or administrators, will, so long as the same sum, or any part thereof, shall remain unpaid, pay to the said *M. J. Nutting*, her executors, administrators, or assigns, interest for the said sum of £2200, or for so much thereof as shall for the time being remain unpaid, at the rate of 5 per cent. per annum, by equal half-yearly payments, the first of such half-yearly payments to be made on the expiration of twelve calendar months next after the said living shall first become vacant."

After the execution of this deed the living first became vacant in April, 1879, and Mr. *Sneyd* shortly afterwards presented himself and became the rector. He paid Mrs. *Nutting* interest on the £2200 for some time in accordance with the covenant in the mortgage deed, but ultimately he allowed the interest to fall into arrear, and on the 17th of July, 1882, Mrs. *Nutting* commenced an action in the Queen's Bench Division against him for the £2200 and interest. By the writ, which was specially indorsed, the Plaintiff claimed as due on the covenant £2200 for principal, and £81 7*s.* 4*d.* for interest, and also costs. The Defendant did not appear to the writ, and, on the 29th of July, the Plaintiff signed judgment for £2281 7*s.* 4*d.* principal and interest, and £4 6*s.* costs, making together £2285 13*s.* 4*d.* The £81 7*s.* 4*d.* represented the interest at 5 per cent. due in respect of the £2200 up to the 17th of July, the day of the issue of the writ. Interest from that day until the day on which the judgment was signed was not included in the judgment. On the 11th of November, 1882, Mrs. *Nutting* issued a writ of *fi. fa.* on the judgment, by which writ the sheriff was commanded to levy for £2281 7*s.* 4*d.* and £4 6*s.* costs, together with interest thereon respectively at the rate of 4 per cent. per annum from the 29th of July, 1882. On the 14th of November, 1882, Mr. *Sneyd* filed a liquidation petition in the *Oxford* County Court, and on the same day an order was made restraining Mrs. *Nutting* until the 10th of December, 1882, from taking any further proceedings

under her judgment. The injunction was afterwards extended until after the 10th of January, 1883. The first meeting of the creditors under the petition was held on the 7th and 14th of December, 1882. The statement of affairs then produced by the debtor shewed that he was indebted to Mrs. *Nutting* in the sum of £2317 10*s.* 7*d.* This sum was said to be made up thus:—

	£	*s.*	*d.*
Judgment debt and costs	2285	13	4
Interest thereon at 4 per cent. from 29th of July to 14th of November	27	1	6
Costs of *fi. fa.*	1	10	0
Further costs	3	5	9
	2317	10	7

The creditors resolved to accept a composition of 2*s.* in the pound, and a trustee was appointed for the receipt and distribution of the composition. The resolutions were confirmed at the second meeting on the 27th of December, and they were registered on the 6th of January, 1883. Mrs. *Nutting* took no part in the meetings, and she in no way assented to the resolutions. The injunction having expired, the sheriff, on the 26th of January, 1883, made a return of *nulla bona* to the writ of *fi. fa.*, and that Mr. *Sneyd* had no lay fee within his bailiwick, and at the same time certified that he was a beneficed clerk, being rector of the parish of *Chastleton*. On the 27th of January Mrs. *Nutting* issued a writ of sequestration, by which the Bishop of *Oxford* was commanded to sequester the fruits and profits of the rectory of *Chastleton* until he should have levied the sum of £2285 13*s.* 4*d.* and interest thereon, and on the 4th of February notice of the sequestration was affixed to the door of the church of the parish. An application was then made to the County Court by the trustee under the composition resolutions and the debtor for an injunction to restrain the bishop from taking any further proceedings under the sequestration.

Mrs. *Nutting* resisted the application on the ground that she was not bound by the composition resolutions. She alleged that the amount due to her by the debtor had not been accurately

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stated in his statement of affairs. The principal ground on which it was alleged that the statement was inaccurate was that interest on the £2200 ought to have been calculated from the date of the judgment, not at the rate of 4 per cent. but at the rate of 5 per cent. according to the covenant in the mortgage deed. She also claimed £15 19*s.* for costs incurred to her solicitors in relation to the mortgage, but as to £10 7*s.* 2*d.*, part of that sum, one of her solicitors deposed that it was due for work done and services rendered by his firm at the request of the debtor in relation to the mortgage debt and an attempted sale or exchange of the advowson. On the 20th of March the Judge made an order absolutely restraining the bishop from taking any further proceedings under the sequestration. The bishop appealed to the Chief Judge. The appeal was heard on the 11th of May, 1883.

Winslow, Q.C., and *Macaskie*, for the Appellant:—

Mrs. *Nutting's* debt is not correctly set out in the debtor's statement of affairs, and therefore under the *Bankruptcy Act*, 1869, s. 126, she is not bound by the composition and it did not bar her action: *Macdonald* v. *Chesney* (1); *Burliner* v. *Royle* (2); *Ex parte Lang* (3); as, notwithstanding the judgment, 5 per cent. interest is still payable under the express covenant in the mortgage deed, and the debtor cannot avail himself of his own default for the purpose of reducing the rate to 4 per cent: *Popple* v. *Sylvester* (4). In any case the creditor is entitled to interest (for which no allowance has been made) for the period between filing the petition and the registration of the resolutions for composition, which is the time for ascertaining the amount of debt and up to which date there is no valid binding agreement between the debtor and creditor such as to raise any equity against the creditor, and to prevent him from levying execution on the judgment: *Ex parte McLaren* (5).

An injunction to restrain Mrs. *Nutting* from further proceedings on her judgment was refused, and rightly refused, on the 15th of February, 1883, how then can she be restrained indirectly by

(1) 50 L. J. (Q.B.) 87.
(2) 5 C. P. D. 354.
(3) 5 Ch. D. 971.
(4) 22 Ch. D. 98.
(5) 16 Ch. D. 534.

an order restraining the ecclesiastical sheriff (the bishop) from proceeding with the sequestration?

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Hon. *B. Coleridge*, and *Allen*, for the Trustee and the Debtor :—

The amount of the debt is properly stated in the schedule, as the amount due for interest at the time of filing the petition, after which the matter has passed out of the debtor's hands, was entered. If the contention on the other side be well founded no resolution could ever be binding, as the debtor cannot know in advance when registration will take place, so as to be able to anticipate the exact amount of interest which will then be due. Upon the main contention raised by the Appellant we say that from the date of the judgment the mortgage debt with the covenant to pay interest at 5 per cent. became merged in the judgment, and that interest is payable at 4 per cent. only : *In re European Central Railway Company* (1). *Popple* v. *Sylvester* (2) does not apply, as the question there did not arise in bankruptcy, and the covenant was a distinct and separate covenant to pay interest at the rate of 7 per cent. so long as the principal or any part thereof should remain unpaid. We rely on the distinction taken by Lord Justice *Fry* in *Popple* v. *Sylvester*, who points out that the effect of the judgment was to extinguish the personal covenant to pay the mortgage debt. Moreover, Mrs. *Nutting* directed the levy to be with interest at 4 per cent. only, and cannot now claim the additional 1 per cent., and the debt arising out of the personal covenant became merged in the judgment : *King* v. *Hoare* (3).

BACON, C.J. :—

This is a case of some importance under sect. 126 of the *Bankruptcy Act*, 1869. Under that section when a debtor wishes to obtain the benefit of the Act of Parliament by presenting a liquidation petition he must prepare a statement of his affairs, setting out the names and addresses of his various creditors and the whole of the debt due to each. The principle on which cases arising under sect. 126 should be decided is stated in the

(1) 4 Ch. D. 33. (2) 22 Ch. D. 98.
(3) 13 M. & W. 494.

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judgments of Lord Justices *Bramwell* and *Brett* in *Macdonald* v. *Chesney* (1), and indeed that principle would be obvious without any decisions. The obligation is on the debtor to state all that he owes and to whom he owes it. In this case the creditor was a mortgagee, and there is nothing in the composition which can affect her rights under the mortgage unless she is bound by the composition. The principal money and interest due to her being unpaid she sues the debtor for it at law, and on the 29th of July, 1882, judgment was signed for the whole amount, principal, interest, and costs then due. She has a right to issue execution for the amount of such judgment. She exercises that right, and issues a writ of *fieri facias*, to which the sheriff returns *nulla bona*. That does not affect her rights under the mortgage. From the date of the judgment she has a right to interest upon her debt at 4 per cent.; that is the right given to her by law independently of her rights by contract. She has a right to the sum for which judgment is recovered, but she is not obliged to give up her rights under the mortgage deed. She may sue for the principal and for the interest due from time to time in default of payment under the terms of the mortgage deed. She may foreclose, and may in fact exercise any of the rights which mortgagees possess. No composition can defeat her rights in the slightest degree. It does not defeat the operation of the covenant to pay 5 per cent. interest whilst any money remains due upon the security of the mortgage deed. Between the date of the judgment and the date of filing the liquidation petition she has become entitled to a further sum in respect of interest, which, when added to the sums for which judgment has been signed, makes the amount entered in the statement as the sum due to the mortgagee less than what is really due to her; and unless I am to decide in direct contradiction to the authorities, the composition, unless the debt is accurately stated, does not bind the creditor in the slightest degree. She declines to be bound by it, and when she seeks to put in force her legal right she is restrained by an order in bankruptcy. The debtor has no right to interfere with this creditor, who has taken nothing which belongs to the general body of creditors. I can see no ground or foundation for

(1) 50 L. J. (Q.B.) 87.

restraining the sheriff, who is simply the officer of the Court and bound to execute the judgment put into his hands for execution. To hold that the judgment puts an end to the covenant to pay 5 per cent. interest would be absurd, as the covenant did not begin to operate in this case until after the judgment was signed. Interest at 4 per cent. is payable by law under the judgment, but the debtor also owes 5 per cent. on the covenant contained in his mortgage deed, and the judgment which gives 4 per cent. interest cannot have the effect of taking the seal off the mortgage deed which covenants for payment of 5 per cent. interest. He must be taken to have known that he was liable to pay 5 per cent. upon this covenant, although execution had been put in upon the judgment, and execution could not be levied for more than 4 per cent. It comes no doubt to a very minute point, but defective this statement of the debt certainly is; binding upon the creditor it is not. The Court of Bankruptcy, in my opinion, has no right to restrain these proceedings. All the rights of this creditor can be enforced, and since a certain amount lawfully due to this creditor is omitted from the debtor's statement of affairs, the order made was quite wrong and must be discharged with costs.

F. G. A. W.

C. A.

From this decision the trustee appealed. The appeal was heard on the 30th of November, and the 1st of December, 1883.

Romer, Q.C., and Hon. *B. Coleridge*, for the Appellants:—

The covenant to pay interest at 5 per cent. after the day fixed for the payment of the principal is merged in the judgment: *In re European Central Railway Company* (1). That case is very like the present. *Popple* v. *Sylvester* (2) is distinguishable. There the covenant was to pay interest at 7 per cent. so long as the principal sum, or any part thereof, should remain due on the security.

[FRY, L.J.:—There the claim was against the produce of the policies which had been charged.]

Money may remain due on a security after composition reso-

(1) 4 Ch. D. 33. (2) 22 Ch. D. 98.

C. A. 1883 *Ex parte* FEWINGS. *In re* SNEYD.

lutions, but personal covenants are discharged by the composition. This is a merely personal covenant. The principal debt is merged in the judgment; how can interest continue to run upon it independently of the judgment? There is no independent covenant to pay interest as there was in *Popple* v. *Sylvester* (1). In the present case the interest is attached to the principal, and the covenant to pay it is merged in the judgment for the principal.

It is said that interest is due at 5 per cent. for the interval between the issue of the writ and the judgment. But that interest might have been included in the judgment, and, if a man signs judgment for less than he is entitled to, he must be taken to have abandoned the rest of his claim.

As to the costs which are claimed by Mrs. *Nutting's* solicitor, and for which it is said the debtor is liable, if they were incurred at his request, the debt would be due to the solicitor, not to Mrs. *Nutting*.

[COTTON, L.J.:—It does not follow that costs which would be allowed as mortgagee's costs on the redemption of the mortgage would be a debt due by the mortgagor.]

Winslow, Q.C., and *Macaskie*, for the bishop:—

Popple v. *Sylvester* exactly applies. The covenant to pay the principal, and the covenant to pay interest after the day appointed for payment of the principal, are two distinct covenants. There is still a debt due under the terms of the mortgage deed.

[LINDLEY, L.J.:—The question in *Popple* v. *Sylvester* was, not for what sum an action could be maintained, but how much could be recovered out of the security.

FRY, L.J.:—The ground of my decision was, that there was an express covenant to pay interest so long as anything could be recovered out of the security.]

If the money is paid the security is gone. The covenant is to pay interest until the £2200 shall be completely paid. It cannot be said that Mrs. *Nutting* has been paid, though she has now an additional remedy under her judgment. The word "unpaid" must have its ordinary meaning. The debt is not paid because

(1) 22 Ch. D. 98.

the creditor has got another security for it. "Paid" refers to an actual receipt of money.

The amount in respect of which a mortgagee or any other creditor is entitled to claim a composition is the amount due to him at the time when the composition is forced on him, *i.e.*, at the date of the registration of the resolutions. Until the registration of the resolutions they are not binding on the dissentient creditors: *Bankruptcy Act*, 1869, ss. 12, 31, 126; Bankruptcy Rules, 1870, rr. 77, 274. At any time before the registration a creditor may levy execution on the debtor's goods: *Ex parte McLaren* (1). The debtor, therefore, ought to state in his statement of affairs the amount of the debt on which the creditor will be entitled to claim the composition, and consequently he ought in his statement of affairs to say that interest will run on the debt down to the date of registration. At any rate he should calculate the interest and state the amount down to the date of the first meeting, when the statement of affairs is presented. It is important for the particular creditor to know what the debt is upon which a composition is to be tendered to him, and it is important that the other creditors should know what the total amount is which the debtor will be liable to pay.

At any rate interest at 5 per cent. should have been calculated on the £2200 for the interval between the issue of the writ and the signing of judgment; the judgment cannot bar the remedy on the covenant until the judgment is signed: *Florence* v. *Jenings* (2).

It is said that income tax ought to be deducted from the interest; but it cannot be deducted from a judgment debt, and certainly not unless it has been paid by the mortgagor.

The *Judgment Act* (1 & 2 Vict. c. 110), was intended to enlarge the rights of judgment creditors, not to take away any right which they already had. If the argument for the Appellants is sound, it follows that the right to recover twenty years' interest on the covenant is cut down to six years: 3 & 4 Will. 4, c. 27, s. 42; *O'Kelly* v. *Bodkin* (3); *Fisher* on Mortgages (4); and, moreover, it would follow that a mortgagee who had recovered judgment

(1) 16 Ch. D. 534.
(2) 2 C. B. (N.S.) 454.
(3) 3 Ir. Eq. Rep. 390.
(4) 4th Ed. p. 902.

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for his mortgage debt before the passing of the *Judgment Act* could not recover any interest at all afterwards. There is no authority for such a proposition as that.

As to costs, Mrs. *Nutting* is entitled to recover any costs relating to the mortgage for which she is liable to her own solicitor.

[COTTON, L.J.:—Can she maintain an action for them against the mortgagor? That is quite a different thing from recovering them as part of the price of redemption.]

She is liable for the costs to her own solicitor, and the debtor is liable to indemnify her. She is entitled to recover from him what she pays to the solicitor. The object of the *Bankruptcy Act* is to release a debtor from "liabilities" as well as debts, and it was intended that a debtor when he files a liquidation petition should state to his creditors all possible demands against his estate, so that they may be in a position to decide what course to take for its administration, and whether any offer of a composition made by him is advantageous to them.

[COTTON, L.J.:—I do not see how costs incurred by a mortgagee for the protection of the mortgaged property could be the subject of an action of debt against the mortgagor.]

They could clearly be added to the amount which the mortgagor must pay to redeem the property, and the foundation of the right so to add them must be an implied promise by the mortgagor to pay them. Such a promise would support an action.

Coleridge, in reply, was directed by the Court to confine himself to the question to what date the interest ought to have been calculated in the statement of affairs.

Rule 92 says that the statement is to be according to the form in the schedule, and Form 39 of a statement of affairs given in the schedule says that it is to be as at the "date of the institution of the proceedings."

[He was stopped by the Court.]

COTTON, L.J.:—

This is an application by a compounding debtor and the

trustee appointed under the composition to restrain one of the creditors from enforcing a sequestration. The creditor says: "I am not bound by the resolutions accepting the composition, and therefore I ought not to be prevented from pursuing the rights which I have independently."

Several objections have been taken to the validity of the composition arrangement as against the creditor who is seeking to enforce her independent rights, and the principal one is this: The Act requires that the statement of his affairs which is to be submitted by the debtor to the meetings of his creditors shall shew the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due, and the composition is to be binding only on those creditors whose names and addresses, and the amount of the debts due to whom, are properly set forth in the statement.

It it said that the debt due to Mrs. *Nutting*, the creditor in question, was not correctly stated by the debtor. The debt arose under a covenant contained in a mortgage deed for the payment of a sum of £2200, with interest at 5 per cent., six months after a certain living should become vacant, and there was this further covenant, that if the £2200, or any part thereof, should remain unpaid after the expiration of the six months, the mortgagor would, so long as the same sum or any part thereof should remain unpaid, pay to the mortgagee interest for the said sum, or for so much thereof as should for the time being remain unpaid, at 5 per cent. The mortgagee brought an action on this covenant, and recovered judgment for the principal sum, and interest thereon at 5 per cent. up to the date of the writ, and costs, and the debt which was stated by the debtor as being due to her was the amount of the judgment debt, with interest thereon from the date of the judgment to the date of the presentation of the petition, calculated, not at the rate of 5 per cent., but at the rate of 4 per cent., that being the rate of interest which a judgment debt carries by statute. It is contended that this calculation was erroneous, inasmuch as it is based on the interest being due at 4 per cent., and not at 5 per cent., from the date of the judgment.

In my opinion that contention is unfounded, for, so soon as the judgment was obtained, it put an end to the liability under the

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covenant to pay the £2200, and the debt became due on the judgment, not under the covenant.

But it is said that, though the liability under the covenant to pay the £2200 is merged in the judgment, yet here there is a further and separate covenant to pay interest at 5 per cent. so long as the £2200, or any part thereof, shall remain unpaid, and no part of the £2200 has yet been paid.

In my opinion the true construction of that covenant is this, that interest at the rate of 5 per cent. shall be paid so long as any part of the £2200 remains due under the covenant, so long as the covenant for payment of the £2200 remains in force, so as to enable Mrs. *Nutting* to sue upon it and to enforce payment of that sum or any part thereof. But that covenant is now at an end; the liability under it for the £2200 is gone, it is merged in the judgment, and it cannot be said that, notwithstanding that the covenant to pay the £2200 is gone, there is a separate covenant to pay interest at 5 per cent.

The decision of Lord Justice *Fry* in *Popple* v. *Sylvester* (1) was relied on. That case is not now before us by way of appeal, but, assuming it to have been correctly decided, the covenant there was entirely different from the covenant in the present case. The covenant there was to pay interest at 7 per cent. so long as any money should remain due on the security of the deed, and, assuming that decision to have been right, that it remained in force after judgment had been recovered for the principal debt, in my opinion it does not control the present case, where the claim is one of debt, not a claim in an action for redemption or foreclosure. Then the case of *Florence* v. *Jenings* (2) was quoted, where the plaintiff had discounted for the defendant a bill for £250, and there was a distinct independent agreement by the defendant for the payment, as interest, of £20 for each month after maturity of the bill, so long as the £250 should be unpaid. An action was brought on the bill, and judgment was recovered for the £250, and afterwards the plaintiff brought another action on the separate agreement for interest at £20 per month, and it was held that he could recover that interest down to the date of the judgment in the first action, but that, as from the date of the

(1) 22 Ch. D. 98. (2) 2 C. B. (N.S.) 454.

judgment, the principal debt of £250 due on the bill being merged in the judgment, he could no longer recover any interest on the entirely independent agreement, because the judgment had put an end to the liability on the bill. So that *Florence* v. *Jenings* (1), though it was quoted on another point, strongly supports our decision on this point.

Another objection is this. It is said that the debt, as shewn in the statement of affairs, did not include interest for the period between the date of the writ in the action and the date of the judgment, the Plaintiff not having signed judgment for that interest. In my opinion that objection cannot prevail, because the judgment might have been drawn up on the cause of action which the creditor was prosecuting, viz., the covenant, so as to include interest down to the date of the judgment, and not merely to the date of the writ. Of course a creditor cannot be compelled to take interest down to the date of his judgment, and, if he does not choose to claim it, he cannot afterwards bring a separate action for the interest which he might have obtained in his first action, but which he omitted to claim. In my opinion, therefore, that objection cannot prevail, and *Florence* v. *Jenings* is no authority for it, because there no judgment could have been recovered in the original action for the interest at £20 a month down to the date of the judgment. The right to that interest depended on a contract which was not in issue, not relied upon, in the first action.

Then another objection is this. It is said that, to the amount stated by the debtor as due to Mrs. *Nutting*, there ought to be added the costs of certain abstracts which were prepared by her solicitor for the debtor, and it was said that she was liable to her solicitor for these costs, and could therefore maintain an action for them against the debtor at whose request the work had been done. On the evidence we can dispose of this objection very shortly. The solicitor says that he did this work at the request of the debtor. He happened to be also the solicitor of Mrs. *Nutting*, but he did not do the work at her request or by her instructions, and therefore, the claim, if any can be made against the debtor, must be made by the solicitor, not by Mrs. *Nutting*.

(1) 2 C. B. (N.S.) 454.

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The argument really comes to this, that, if any one goes to my solicitor and asks him to do work for him relating to property of which I am the owner, that work can be charged to me although I never ordered the solicitor to do it. The work must, of course, be charged by the solicitor to the person who ordered him to do it, and not to some other person who happens to be his client, but who has never given him any directions or instructions for the work.

Lord Justice *Fry* reminds me that, independently of the £10 for work which is said to have been done at the request of the debtor, there are some items amounting to £5 12*s.* for work done by the directions of Mrs. *Nutting*, the mortgagee herself, and it is said that she can claim those items as a debt due from the debtor. In my opinion that is erroneous. No doubt, if the debtor, in his character of mortgagor, claimed to redeem the mortgage, the Court would not grant him that which originally was an indulgence, a departure from the strict tenor of his legal right, without imposing upon him the condition of paying the mortgagee, not only the debt which he had contracted to pay by his covenant, but any expenses which had been properly incurred by the mortgagee in her position as such. But that is an entirely different thing from saying than an action of debt could be maintained by the mortgagee against the mortgagor for those expenses. It is said that the mortgagee's right in a redemption action is founded on an implied contract by the mortgagor to pay these costs, but I am of opinion there is no such contract, but as a condition of redemption that a Court of Equity imposes on the mortgagor the terms of paying all costs properly incurred by the mortgagee for the purpose of protecting the estate or himself as mortgagee.

There is one other point, and that is, that the interest calculated by the debtor, in making up the amount which he stated as the debt due to Mrs. *Nutting*, was calculated only down to the date of the presentation of the petition, and not down to the date of the first meeting of the creditors. That appeared at first to be a somewhat formidable objection. It is not, however, necessary to go into the question what is the amount upon which the composition will have to be paid. The question we have to

consider is whether the statement of affairs correctly shewed the amount of the debt as required by the Act. In my opinion, having regard to the terms of Form 39, we cannot hold that the statement in the present case was incorrect, because it calculated the interest, not down to the date of the meeting at which the statement was presented, but only down to the time when the proceedings were instituted or commenced by the presentation of the petition.

I am of opinion, differing from the Chief Judge, that the objections to the resolutions cannot prevail, and that an order must be made restraining further proceedings under the sequestration.

LINDLEY, L.J. :—

I am of opinion that the order made by the County Court Judge restraining the enforcing of the sequestration was correct. The only point, as I understand, before the Chief Judge was, what I may call the substantial one, whether, notwithstanding the judgment, interest at 5 per cent. was still recoverable under the covenant in the mortgage deed. The Chief Judge thought that, having regard to the language of the covenant, the debt of £2200 still bore interest at 5 per cent., although under the statute the judgment debt would have borne interest at only 4 per cent.

That is a question of some importance, and it turns on the construction of the covenant. The use of the word "unpaid" in the covenant is relied upon. The covenant is to pay 5 per cent. so long as the principal or any part thereof shall remain unpaid. The question is what does "unpaid" mean? It cannot mean exclusively payment in cash. Nobody would pretend that, if the debt was satisfied in any other way than by payment in cash, the interest at 5 per cent. would still run on. I take it that the true construction is that, so long as the debt is due under the covenant, interest at 5 per cent. shall run. Now it may be technical, but it is well settled, that, if there is a debt secured by a covenant, and judgment is recovered on the covenant, the debt on the covenant, merges in the judgment debt. In point of law the £2200 is no longer payable under the covenant, it is payable under the judgment; the covenant to pay interest is gone, and the judgment debt bears interest only at 4 per cent.

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It is said that the effect of this will be to vary the contract between the parties. I think it may vary the contract, but it must be borne in mind that the creditor who obtains a judgment for principal and interest gets compound interest; his judgment carries interest at 4 per cent. upon the arrears of interest, as well as upon the principal. It is not, therefore, a total loss of 1 per cent. When we look at the authorities, it appears to me that this case is much more closely within *In re European Central Railway Company* (1), than *Popple* v. *Sylvester* (2), in which the language of the covenant pointed to money remaining due on the security of the deed. Here the language is entirely different. I am of opinion that, upon the true construction of this covenant, the obligation to pay the interest at 5 per cent. is gone, and that the interest to which the creditor is entitled is that which the judgment debt bears and no other.

The other points were very technical, there is nothing but pure technicality in them. It was urged that the interest on the judgment debt was not calculated in the statement of affairs down to the proper date. I understood Mr. *Winslow* to say that the interest should have been calculated down to the registration of the resolutions, but Mr. *Macaskie* has put that right, and his point is this, that the interest has been calculated only down to the date of the petition, when it ought to have been calculated down to the date of the production of the statement of affairs. Mr. *Macaskie's* point seems to me to have a great deal more in it than Mr. *Winslow's*, and for this reason, that he was apparently right as regarded the language of the 126th section. But, when we look at Form 39, it would be utterly misleading and a mere trap for debtors, if a person who has literally complied with it is to be held to have done wrong. Looking at sect. 126 with the light thrown on it by Form 39, I think the debt has been sufficiently stated.

There was another point, as to the interest not having been calculated for the period between the date of the writ and the date of the judgment. I suppose the Plaintiff in the action could properly have included in his judgment interest up to the date of the judgment, and his not doing so was probably a slip. I dare

(1) 4 Ch. D. 33. (2) 22 Ch. D. 98.

say upon an application to a Judge at Chambers it would have been corrected. But we are asked to say that, because of that slip, there is still a debt outstanding in respect of that unclaimed interest. If the Plaintiff were to sue the Defendant again for that uncalculated interest, his action would be considered frivolous, and would fail, and he would have to pay the costs of it. The former judgment, if not set right by an application at Chambers, would be a bar, and the Plaintiff would be taken to have waived that interest.

As to the point that some costs were due from the debtor to Mrs. *Nutting* which ought to have been inserted in the statement of affairs, the facts do not establish any personal liability on the part of the debtor to pay Mrs. *Nutting* these costs. No personal liability is made out, and that objection therefore fails.

FRY, L.J.:—

I am of the same opinion. The first question is simply one of construction. When there is a covenant for the payment of a principal sum, and a judgment has been obtained upon the covenant for that sum, it is plain that the covenant is merged in the judgment, and, if there is a covenant to pay interest which is merely incidental to the covenant to pay the principal debt, that covenant also is merged in a judgment on the covenant to pay the principal debt. Of course a covenant to pay interest may be so expressed as not to merge in a judgment for the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a judgment. In *In re Agriculturist Cattle Insurance Company* (1) the Court of Appeal held that a covenant to pay interest was independent of a judgment for the principal, and that, although the judgment debt only carried 4 per cent. interest, the agreement to pay interest at 6 per cent remained in force. So again in *Popple* v. *Sylvester* (2) there was an independent covenant for the payment of interest, and I held, as a matter of construction, that that covenant remained in force so long as any principal money could be recovered by the mortgagee in an action for the foreclosure or the redemption of the mortgage. On the other

(1) 4 Ch. D. 34, n. (2) 22 Ch. D. 98.

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hand, there are cases which shew that, if there is no distinct covenant of that kind to pay interest, the subsidiary covenant for payment of interest falls with the covenant for payment of the principal. That is well illustrated by *In re European Central Railway Company* (1), in which case Lord Justice *Bramwell* said (2), "All that the company bound themselves to pay by that instrument was the sums of £1000 and £60 for interest by two instalments, on or before the 11th of October, 1865. There is no fresh contract evidenced by the forbearance of the creditors, or in any other way, for the payment of any further interest." There was plainly no covenant which went beyond the covenant to pay those two sums for interest. To which class does the covenant in the present case belong? In my opinion it is a covenant to pay interest so long only as any principal money shall remain due upon the covenant. I agree that these words are not to be found in the deed, but I think that is the true construction of the words which are there.

On the other points I entirely agree in what has been said by my learned colleagues.

Solicitor for Trustee: *J. Edgell Searle*, agent for *James Searle, Crediton.*

Solicitors for Sequestrator: *Surman, Henley, & Co.*

(1) 4 Ch. D. 33. (2) 4 Ch. D. 37.

W. L. C.

HEYWOOD *v.* MALLALIEU.

V.-C. B.

1883

Nov. 15, 26.

[1882 H. 1724.]

Vendor and Purchaser—Misleading Condition—Statement in Auction Room—Specific Performance refused.

A dwelling-house and offices were put up for sale by public auction, under a printed condition in a common form, that the lot was sold subject to any existing rights and easements of whatever nature—and the printed particulars made no mention of any easement, or of any claim to an easement. As the result of evidence, it appeared that the house was subject to an easement belonging to the owner of a neighbouring tenement to use the kitchen for particular purposes, and that the vendor's solicitor knew of the rumoured existence of some such easement, but forbore to make inquiries. No grant of an easement appeared from the abstract, and its existence was, in fact, disputed on the pleadings. In the auction room the Plaintiff's solicitor said he had heard of some such claim, but had no definite information about it, and the auctioneer, in hearing of the Plaintiff's solicitor, on being questioned, told the audience that they might dismiss the subject of the rumoured claims from their minds, as nobody would probably ever hear of them again:—

Held, that the conditions were misleading, and the statements in the auction room insufficient, and specific performance of the contract refused.

On the 23rd of January, 1882, a dwelling-house and offices at *Dale*, near *Saddleworth*, were, by the Plaintiff, *Arthur Heywood*, offered for sale by public auction at *Oldham*. The particulars of sale described the property, and said nothing about its being subject to an easement of any kind. The conditions of sale prescribed that the abstract of title should commence with an indenture dated the 16th of November, 1870; and that the purchaser should not require the production of, nor investigate, nor make any objection or requisition in respect of the prior title. Another condition (9), was as follows:—

"Each lot shall be taken to be correctly described as to quantity and otherwise, and is sold subject to any existing public and private rights of way, and other rights and easements of whatever nature, and to any land-tax, tithe-rentcharge, quit rents, and similar out-goings, whether mentioned in the particulars, plans or conditions, or not. If any error, misstatement, or

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omission in the conditions, plans or particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed or claimed by the vendor or any purchaser in respect thereof."

When the property was put up by the auctioneer, no one at first made any bidding, and another lot was put up and sold; then the auctioneer put up the former lot again, and it was knocked down to the Defendant *David Mallalieu*, for £1490, and he signed the contract, and paid a deposit of £150. An abstract was sent setting forth a conveyance of the 16th of November, 1870, from one *John Shaw* to one *Charles Shaw*, and a mortgage from *Charles Shaw* to the Plaintiff, under the power in which deed the sale was made; and on the 9th of July, 1882, Defendant's solicitors sent requisitions on the title, amongst which was the following:—

"Since the sale by auction it has come to the knowledge of the purchaser that the owner or tenant of the adjoining premises at *Lower Dale* possesses the right and privilege of entering the kitchen of the dwelling house intended to be purchased, and of making use of the same for washing clothes and other purposes. It appears that this right (to which no reference is made in the particulars or conditions of sale) has existed for a very great number of years and cannot now be impeached or disputed. The existence of such a right is obviously fatal to the property as a residence, and affects it most seriously and prejudicially from any point of view. The vendor, therefore, must at his own expense forthwith obtain the absolute release and cesser of such right or privilege, otherwise the purchaser will have no alternative but to rescind the contract and demand a return of his deposit."

There was no mention in the abstract, nor in any of the deeds abstracted, of any easement of this kind. The requisition was not answered to the Defendant's solicitors' satisfaction, and on the 28th of February, 1882, they gave notice to rescind.

The action was commenced on the 28th of June, 1882, and the statement of claim (delivered the 25th of July, 1882), charged that the property comprised in the contract was not, and never

had been subject to any such right or easement as that alleged in the above requisition, and submitted that, even if it were so subject, the Defendant was precluded by the 9th condition from making any requisition or objection in respect thereof. The Plaintiff claimed specific performance and consequential declarations.

The statement of defence, delivered on the 30th of October, 1882, said that the easement so discovered by the Defendant was created by the will, dated the 9th of January, 1841, of the Plaintiff's predecessor in title, *James Shaw*, who died shortly after the last date. This testator devised to his son *John Shaw* and another the mentioned premises at *Lower Dale*, together with "full and free liberty to use and enjoy the water in the well and dye-house at *Dale*" (being the property comprised in the contract) "and to wash clothes, brew in, and use the said dye-house, in the manner it had hitherto been enjoyed by his said son *John Shaw*," upon certain trusts in favour of testator's daughter, *Sarah Grant*, for life, and of her children after her death. The same testator, *James Shaw*, also devised the property comprised in the contract to his son, the said *John Shaw*, absolutely. The defence went on to allege that *Sarah Grant* or other the tenants of *Lower Dale* used and enjoyed the well and used the dye-house for washing and for brewing until 1863, when *John Shaw* agreed with her that instead of her right to use the dye-house she should have the right to use the kitchen of the house comprised in the contract for the same purposes and in like manner; that he accordingly removed the boiler, and she removed her washing and brewing utensils to the kitchen of the last-mentioned premises, and that the tenants of *Lower Dale* had ever since used, and were still using, the kitchen of the house comprised in the contract for such purposes; also that the dye-house had been since pulled down. The defence pleaded that *John Shaw*, as trustee, had no power to release the easement and that the agreement between him and *Sarah Grant* in no way affected the rights of *Sarah Grant's* children to the easement, after her death. The Defendant counterclaimed repayment of the deposit (£150), and interest.

In reply (22nd of November, 1882), the Plaintiff said that

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his solicitor, shortly before the auction, was informed that the owner of *Lower Dale*, claimed certain privileges in respect of a supply of water, and of accommodation for washing and drying clothes, but that he was unable to obtain any definite information as to the nature or ground of the claim, and that at the auction he stated openly in the sale-room what he had been informed, and that the lot would be sold subject to the claim of the owner, whatever it might be.

To this the Defendant rejoined (11th December, 1882), that the auctioneer informed the company present that they might dismiss from their minds any idea about the existence of the rights which had been the subject of discussion.

In answer to interrogatories, Plaintiff said that in December, 1881, a firm of surveyors, instructed by his solicitors to report as to the value of the property, received from one Miss *S. A. Walker*, a letter, dated the 2nd of December, in which it was asserted that there were certain privileges belonging to the property of *Sarah Grant*. The passage in Miss *Walker's* letter was:—

"P.S.—*Dale*. Nothing payable or receivable in the way of water privileges to my knowledge. There are certain privileges to Mrs. *Grant's* property. The right of road, use of water in the well, also washing and drying for *Dale Cottage*."

Of this letter Plaintiff's solicitors received a copy on the 4th of December, 1881. On the 9th of December they wrote to Mr. *Shaw*, as follows:—

"Herewith we beg to send proof, particulars, and conditions of sale, and plans of the property at *Broadmeadow* and *Dale*, and shall be obliged if you will let us know whether there is any alteration or addition you can suggest which would tend to make the particulars more complete. . . . We shall be glad if you will give us any information you can as to the nature of the water rights, and other privileges connected with the property;" and Mr. *Shaw*, in answer, dated the 14th of December, said: "The rights of water, ways, and other privileges, are more or less troublesome, as Mrs. *Grant* claims water supply, and wash-house room, &c., &c., and rights of way, &c."

In a letter of the 15th of December, 1881, Plaintiff's solicitors,

writing to *Charles Shaw*, observed: "We think the purchaser must be told that we cannot define the rights of water and other privileges, and that he must make his own inquiries on this score, and take the property subject to all such claims. It may be that Mrs. *Grant*, if it came to be tested, could not substantiate her right to all that she claims."

Mrs. *Grant*, aged eighty-three, daughter of *James Shaw*, deposed to having exercised the rights described in the dye-house down to 1848, when she left; and *Mary Shaw*, her niece, deposed to having exercised the same rights first in the dye-house and afterwards, since about 1870, in the kitchen of *Dale House*.

Mr. *H. P. Gibbons*, one of the firm of Plaintiff's solicitors, in examination, when shewn the letter of the 14th of December, 1881, admitted that he made no further inquiry because he said he was not going to put other people on their guard about mere claims. On the 21st of December he saw *Charles Shaw* who said he understood Mrs. *Grant's* rights were under the will of Mr. *James Shaw*, but that he had no copy, and that perhaps Mr. *Talbot*, who prepared the mortgage, might have one. A copy was sent for, but did not arrive until the 24th of January, the day after the sale. In the auction-room he stated that he had received an intimation that persons representing the owners of *Dale Cottage* claimed some rights with regard to accommodation for washing and drying clothes. In answer to questions as to what the rights were, he said he could not tell whether there were any rights, but if there were, the purchaser must take subject to them. Beyond what the will of *James Shaw* stated the witness knew nothing.

The Defendant and several witnesses on his behalf deposed that Mr. *Gibbons*, in the auction-room, in answer to questions, said it might fairly be taken from all he had heard and from documents in his possession, that the claims and easements said to belong to Mrs. *Grant* did not exist; and that the auctioneer then said, that they ought all to be satisfied with the answer Mr. *Gibbons* had given, and might dismiss from their minds all thoughts about the rights in question, for he felt sure they would never be heard of again outside those doors.

The Defendant further said that he bought the house for a

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residence for himself, and that he should not have purchased the house had he known of the existence of this right.

Marten, Q.C., and *Clare*, for the Plaintiff:—

The solicitor of a mortgagee selling under a power in the deed is not justified in calling attention to claims which may never be substantiated. If the solicitor in this instance had set out these claims, the mortgagor would have complained of his having depreciated the property.

The duty of a vendor is to tell the purchaser all he knows; it is no part of his duty to warn him of doubtful claims. In this instance the Defendant probably knew as much about the existence of these claims as did the vendor's solicitor.

The Defendant in his pleadings does not set up any valid claim. The rights, if any, were exerciseable in or over a dye-house which is pulled down and does not exist. All the Defendant pleads is that somehow these rights were lost, and somehow some rights in or over a kitchen were acquired. But as to these rights to use the kitchen no prescription can apply, for a twenty years' user has not been shewn; and the alleged right, being a freehold right and being an easement only upon the land of another, and not an interest in the land, cannot be created without deed: *Hewlins* v. *Shippam* (1); and here there is no deed.

Hemming, Q.C., and *Levett*, for the Defendant:—

Upon the case, as it stands on the pleadings and evidence, the Plaintiff cannot succeed. One of the points raised by the Defendant in the pleadings is, that a material misstatement was made in the auction-room, and the Plaintiff himself has proved this. The right in the dominant tenement was created by the will of *James Shaw*. Under this will, *John Shaw* became trustee of the dominant tenement, and absolute owner of the servient tenement. He could not therefore, as trustee, abandon the easement, nor could it be abandoned by a tenant for life against remaindermen.

It is said that by use of the kitchen instead of the dye-house the right granted by the will was abandoned. But an abandon-

(1) 5 B. & C. 221.

ment of such a right as this cannot be presumed—it must be proved by deed or by evidence: *Lovell* v. *Smith* (1). No such proof has been adduced here.

The Plaintiff's solicitor admits that he received notice of this easement some time before the sale. He declined to make further inquiry, because, as he said, "I am not going to put other people on their guard about mere claims." This is not in accordance with the duty which a vendor owes to a purchaser: *Dart* on Vendors and Purchasers (2), referring to *Brandling* v. *Plummer* (3). The omission of any statement as to the claim of easement makes condition (9) misleading, and the defect was not cured by the vague statements in the auction-room, and, if they were such as the Defendants' evidence states, was even aggravated by them.

In this case the contract was in writing, or in print; and in such cases parol evidence is not admissible to explain or add to the contract: per Sir *W. Grant* (1808), *Higginson* v. *Clowes* (4). So that a vendor seeking to enforce a written contract cannot rely upon what was said (in this instance only a few hasty words) by the solicitor or the auctioneer in the sale-room. The Plaintiff having sold property describing it as unaffected by an easement cannot compel the Defendant to buy it subject to an easement: *Hughes* v. *Jones* (5). The Plaintiff has never offered compensation; if he had done so the Court would not have enforced a contract in such a case as this, even with compensation: *Shackleton* v. *Sutcliffe* (6).

Whatever may be held to be the result of the evidence given on behalf of the Plaintiff it is at least clear that these defects were concealed by the conditions and minimised in the auction-room.

As to the form of the requisition, it cannot be successfully objected that the Defendant asked about the kitchen only, he having at first never heard about the dye-house.

Clare, in reply:—

The distinction in *Brandling* v. *Plummer* is, that in that case

(1) 3 C. B. (N.S.) 120.
(2) 5th Ed. pp. 113, 114.
(3) 2 Drew. 427.
(4) 15 Ves. 516, 521.
(5) 3 D. F. & J. 307.
(6) 1 De G. & Sm. 609.

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there was an active misdescription in the particulars; here there is no misdescription; we said nothing about easements, except that the purchaser must take subject to easements, if there were any.

Higginson v. *Clowes* (1) is an old instance of an attempt to vary a written contract by parol evidence. Here we are selling under the 9th condition, on which we rely. In the other two cases cited there was no such condition as there is here.

The Defendant (the onus being on him) has not proved the existence of such an easement as he asserts. The requisition is out of date; the dye-house having ceased to exist. In order to render valid such a claim as this, production of a deed is necessary: *Hewlins* v. *Shippam* (2); *Wood* v. *Leadbitter* (3).

BACON, V.C., after observing that the case, in his opinion, did not depend so much upon what took place in the auction-room as upon the letters which had been read, and remarking that Miss *Walker* had not been called as a witness, proceeded to read the letters. He took it that the letter of Miss *Walker* of December, 1881, was written in answer to some inquiry, indeed, it was clear from Mr. *Gibbons's* evidence that this was the case. His Lordship continued:—

That statement (referring to the postscript) is very clear and distinct, and is sufficient to set anybody on inquiry, and to throw upon the vendor the necessity of stating that these claims existed, or were said to exist. Then comes the letter of the 9th of December from the surveyors to Mr. *Shaw*. This letter is put into Mr. *Gibbons's* hands, and when asked what he did on receiving it, he says, "I did nothing; I was not going to put other people on their guard against mere claims." So that I must take it as if it had been done by the Plaintiff himself. I think that a Plaintiff who has knowledge of such claims as these, and who instructs his solicitor to describe the property as it is described in these particulars, and to insert such a condition as that which has been referred to, is mistaken if he thinks he has done enough to justify himself in the course he has pursued. The passage that has been cited from Mr. *Dart's* book very clearly and distinctly states what,

(1) 15 Ves. 516, 521. (2) 5 B. & C. 221.
(3) 13 M. & W. 838.

in my opinion, is the duty of a vendor in this respect. I think the vendor in this instance did not discharge his duty, and that the defect cannot be remedied by the announcement or conversation which took place in the auction-room. The Defendant says he bought the house for the purpose of making it his residence. The claims are referred to, and the auctioneer is invited to define them more particularly. The auctioneer applies to Mr. *Gibbons*, and Mr. *Gibbons* had in his hand, and ought to have had in his mind, a statement of what the claims really were. I think a further statement should have been made; and when a man who is going to buy a house and finds out there are some claims upon it, seeking to know what they are, is told, "Oh, you may dismiss the subject from your mind, nobody will ever hear of the claims again," I cannot say that a decree for specific performance ought to be made against him. I impute no bad intention to the Plaintiff or his advisers, but I say that a man, knowing what this Plaintiff knew, who does not more fully express what he knows, does not do his duty.

There is no question of compensation in the case. The action, therefore, will be dismissed with costs; and on the counter-claim judgment will be for the Defendant, with costs.

Solicitors: *Field, Roscoe, & Co.*, agents for *Pears, Logan, & Gibbons, Liverpool; Bolton, Robbins, Busk & Co.*, agents for *Wrigley & Morecroft, Oldham.*

J. B. D.

V.-C. B.

1883

Dec. 7.

In re BRANDRAM.

Practice—Application for Payment out of Court, whether by Petition or Summons—Fund exceeding £1000*—Lands Clauses Consolidation Act*, 1845*—Rules of Supreme Court*, 1883, *Order* LV. *r.* 2, *subs.* 1.

Freehold hereditaments in the city of *London*, to a moiety of which *A. B.* was entitled after the death of a tenant for life, subject to four life annuities of £50 payable from the death of the tenant for life, were taken by the Metropolitan Board of Works, and the money paid into Court under the *Lands Clauses Act*, 1845. In 1866 an order was made on petition, whereby a sum of £7000 was ordered to be invested to provide for the annuities when they should become payable, and the balance of a moiety of the fund, after providing for the tenant for life's interest, was directed to be paid to *A. B.* In 1868 one of the expectant annuitants died; in 1869 the tenant for life died; and in 1870 another order was made on petition, whereby a sum of stock which would have been sufficient to pay an annuity of £50, was ordered to be transferred to *A.B.*

A second annuitant having died in May, 1883, *A. B.* claimed a sum of £1666 13*s.* 4*d.* consols, being so much of the residue of the investment of £7000 as had sufficed to provide for the second annuity of £50.

Held, that the orders of the Court in 1866 and 1870, amounted to "an order declaring the rights of" *A.B.* within the meaning of subs. 1 of rule 2 of Order LV. of 1883; and that the application ought to be by summons.

The generality of subs. 1 of rule 2 of Order LV. is not cut down or qualified by subs. 7 or any of the subsections of rule 2 following subs. 1.

ADJOURNED SUMMONS.

In about the year 1865, certain hereditaments in *Sise Lane*, in the city of *London*, were taken by the Metropolitan Board of Works under the powers of the *Lands Clauses Act*, 1845, for the purposes of a special Act, called *The Metropolis Improvement Act*, 1863, and the purchase-money, amounting to £47,500, was paid into the *Bank of England* in manner prescribed by the former Act.

The hereditaments so taken were by the will of *Thomas Brandram*, who died on the 1st of October, 1855, devised to testator's brother, *Francis Holles Brandram*, for life, charged with a life annuity of £50 to *Antonio Lopez de Cunha*, and a life annuity of £60 for the benefit of testator's niece *Sophia Ann Brandram*. After the death of *Francis H. Brandram*, the hereditaments were devised, as to one moiety to *Arthur Brandram* absolutely, charged

with the above annuities, and also charged with the payment of four other life annuities of £50 each to testator's nephews and nieces, *Caldwell, Sarah, Emma,* and *Louisa Brandram* respectively; and as to the other moiety, subject to the two first mentioned annuities, to *Samuel Brandram* absolutely.

By an order made on the 17th, and drawn up and passed on the 22nd of February, 1866, In the matter of the estate of *Thomas Brandram,* deceased, and of the *Metropolis Improvement Act,* 1863, and of the *Lands Clauses Consolidation Act,* 1845, on the petition of *Francis Holles Brandram, Arthur Brandram,* and *Samuel Brandram,* upon a petition reciting the death of *Antonio Lopez de Cunha,* and that a sum of £954 8*s.* 9*d.*, had been expended by the Petitioners in the purchase of a life annuity of £60 for *Sophia A. Brandram,* and that the Petitioners had agreed that the value of the life interest of the Petitioner *Francis H. Brandram* in the hereditaments was £6000, and the value of the interest of each of the Petitioners, *Arthur* and *Samuel Brandram,* £20,272 15*s.*; it was ordered that the sum of £954 8*s.* 9*d.*, part of the said sum of £47,500, be paid to the Petitioners; also that the sum of £6000, further part of the said sum, be paid to the Petitioner, *Francis H. Brandram;* also that the sum of £20,272 15*s.* 7*d.*, being one moiety of the residue, be paid to *Samuel Brandram;* and that out of £20,272 15*s.* 7*d.*, the other moiety, £7000 be invested in Bank Annuities in the name of the Accountant-General in trust In the matter, *Ex parte* the Board of Works, In the matter of the Act of 1863, to an account to be entitled "The Account of the contingent annuities of *Caldwell Brandram, Sarah Brandram, Emma Brandram,* and *Louisa Brandram,* under the will of *Thomas Brandram,* deceased;" and that the interest to accrue due on the annuities so to be purchased be paid to the Petitioner, *Arthur Brandram,* during the life of the Petitioner, *Francis H. Brandram*; and that after the decease of the Petitioner, *Francis H. Brandram,* the sum of £50 out of the said interest be paid to each of them, the said *Caldwell Brandram, Sarah Brandram, Emma Brandram,* and *Louisa Brandram,* in satisfaction of their respective annuities; and that the balance, namely, £13,272 15*s.* 1*d.*, be paid to the Petitioner, *Arthur Brandram.*

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On the 28th of January, 1868, *Sarah Brandram*, one of the expectant annuitants, died; and on the 11th of July, 1869, *Francis H. Brandram*, the tenant for life, died; and by another order, made on the 26th of March, and drawn up and passed on the 11th of April, 1870, in the same matters, on the petition of *Arthur*, *Caldwell*, *Emma*, and *Louisa Brandram*, after reciting that the £7000 cash had been laid out in the purchase of £8034 8*s.* 8*d.* Consolidated Bank Annuities; and the two last-mentioned deaths; and that the amount of Bank Annuities required for the payment of the three remaining annuities of £50 was £5000, it was ordered that, out of the £8034 8*s.* 8*d.* Bank Annuities, £3034 8*s.* 8*d.* like annuities should be transferred to the Petitioner, *Arthur Brandram*, and that, out of the interest on the remaining £5000 like annuities, the three annuities of £50 each should be paid to the Petitioners, the three surviving annuitants respectively, and the residue of the interest to the Petitioner, *Arthur Brandram*.

On the 23rd of May, 1883, *Emma Brandram* died; and on the 7th of November, 1883, a summons in the matters was taken out on the part of *Arthur*, *Caldwell*, and *Louisa Brandram*, and *Arthur Styan*, that out of a sum of £24 9*s.* 7*d.* cash in the Bank on the credit of the above account, the sum of £17 16*s.* 11*d.*, being the proportionate part of the annuity by the order of the 26th of March, 1870, directed to be paid to *Emma Brandram* from the 11th of January to the 23rd of May, 1883, might be paid to *Arthur Styan*, executor of *Emma Brandram*, and the residue to *Arthur Brandram*; that any dividends to accrue on the annuities thereinafter prayed to be transferred to *Arthur Brandram* previous to the transfer, might be paid to him; and that £1666 13*s.* 4*d.* Consuls, part of the sum of £5000 like annuities on the aforesaid credit, might be transferred to him; and that out of the interest as it should accrue due on the £5000 previous to such transfer, and on the £3333 6*s.* 8*d.* remaining on the said credit after such transfer, the two annuities of £50 each should be paid to the surviving annuitants respectively; and that the Board of Works might be ordered to pay the costs, as between solicitor and client, of the application and incident thereto, to be taxed if the parties differed.

Millar, Q.C., for the summons:—

The question is one of procedure under the Rules of 1883—whether, the amount being over £1000, and the applicant being absolutely entitled, the application should be by summons or by petition.

It is submitted that the case falls within sub-sect. 1 of rule 2 of Order LV., inasmuch as there has been here an order declaring the rights of the applicant, and the title of the applicant depends only upon proof of the "death of" a person, namely, the anunitant, *Emma Brandram*.

[He referred to *In re Calton's Will* (1) and *In re Maidstone and Ashford Railway Company* (2).]

In this instance the fund is over £1000, and the point has been considered of sufficient importance to be adjourned into Court on an agreed statement of facts.

Pownall, for the Metropolitan Board of Works, said, that whilst he did not dispute any of the statements that had been made, he must not be understood to have agreed to any statement of facts.

BACON, V.C.:—

The facts must be clearly in evidence. No agreement between the parties will do away with the necessity of proof. The orders of the Court will of course prove themselves; and if proof is furnished of the other facts, such as that one moiety of the fund was paid to *Samuel* and the other to *Arthur Brandram*, less this sum of £7000; that *Emma Brandram's* will has been duly proved by the executor, and the like; that will be sufficient.

I have now only to decide whether the order to be made should be made upon summons or upon petition.

The only point on which the Chief Clerk felt any doubt was whether, this being an application in the matter of the *Lands Clauses Act*, the case was not governed by sub-sect. 7, which says nothing about payment out of Court. I answer that question by reading the rule itself. The Order introduces a new mode of procedure, to be adopted with certain qualifications.

(1) *Ante*, p. 240. (2) *Ante*, p. 168.

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[His Lordship read rule 2, and continued:—] The first sub-section under that rule is as follows:—[His Lordship read sub-sect. 1, and continued:—] Now after that, what have I to do with any other provision? The sub-section seems to me to be clear and explicit. It does not refer to the *Lands Clauses Act*, or to any other Act. All I have to consider is, whether the person who makes the application is a person whose rights have been declared by a judgment or order, or a person whose title depends only upon proof of the identity, or the birth, marriage, or death of any person. Now here there is an order which does declare the rights of this applicant. The order of 1866 did practically declare that *Arthur Brandram* was entitled to the fund, subject to payment of the four annuities; and then when one of the annuities ceased, the Court, in 1870, gave to *Arthur Brandram* the fund which had hitherto represented that annuity. So that, in my opinion, the case is clearly within the sub-section.

Is any difficulty created by the other sub-sections? The second differs from the first only in this respect—that in cases where no judgment or order has been made, and where the title does not depend upon proof of identity, or of birth, marriage, or death—that is to say, when the applicant comes and proves his title, an order may be made, if the value does not exceed £1000. That sub-section is additional to the former, it is not at variance with nor does it qualify it in any degree. Then there is the 3rd sub-section, to which the observation I have already made directly applies. In a case where there has been no judgment, no order—but where a title has to be made out—then an application for payment of dividends must be made by summons. The fourth sub-section relates to the payment out of moneys paid in under the *Legacy Duty Act*; and then comes the case of applications under the *Trustee Relief Acts*, in cases where the money or securities do not exceed £1000—cases with which on the present occasion we have nothing to do. None of these sub-sections can be held to qualify in any way the provisions of sub-section 1. Then comes the sixth sub-section which deals with parliamentary deposits under the Act of the 9 & 10 Vict., in which occur the words, "payment out of Court," to which reference has been made; and then a sub-section dealing with applications under

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the *Lands Clauses Act*, which in terms refers only to investment and to payment of dividends, and does not say anything about "payment out of Court." That is an additional proviso, whereby a man who has proved his right to money in Court, can apply for its investment, and for the payment of the dividends; but it does not refer to or qualify any preceding sub-section. And then follows a similar rule with regard to applications under the *Trustee Acts*.

Therefore, reading the first of these sub-sections according to its true sense and meaning, and finding that in this case there has been an order declaring the rights of the present Applicant, he is entitled, in my judgment, to proceed in Chambers by a summons; and the Board of Works are not to be burdened with the costs of a petition, when the applicant's title has been fully made out.

I repeat that, in my opinion, the previous orders of the Court do amount to a declaration of the rights of the applicant within the meaning of sub-sect. 1, and I do not think that that sub-section is restricted or qualified in its operation by any of the following sub-sections.

Solicitors: *Tompson, Pickering, Styan, & Neilson; Solicitor to the Board of Works.*

J. B. D.

In re MADGWICK.

V.-C. B. 1883 Dec. 7.

Practice—Application for Payment out of Court, whether by Petition or Summons—Sum not exceeding £1000*—Lands Clauses Consolidation Act*, 1845*—Rules of Supreme Court*, 1883, *Order* LV. *r.* 2, *subs.* 2.

An application for payment out of Court to a person absolutely entitled of a sum of cash not exceeding £1000 paid in under the *Lands Clauses Consolidation Act*, 1845, is rightly made by summons, not by petition.

ADJOURNED SUMMONS.

Land in the parish of *Longparish, Southampton*, belonging to a Mr. *Madgwick*, had been taken by a railway company under the compulsory provisions of the *Lands Clauses Act*, and the

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amount of Mr. *Madgwick's* claim, consisting of £576 18*s.*, had been paid into Court by the company under the 85th section.

The Company and Mr. *Madgwick* now applied to have the above sum paid out to the latter, and the question was whether the application should be by summons under subs. 2 of Order LV., rule 2, or by petition.

Herbert J. Lake, for the Applicant, submitted the point; and cited *In re Maidstone and Ashford Railway Company* (1).

BACON, V.C.:—

The second subsection of the rule applies to the payment to any person of cash not exceeding £1000 standing to the credit of any cause or matter, in cases where no previous order of the Court has been made. So that if any person makes a statement and proves his right to cash standing in Court, the sum not exceeding £1000, he is entitled to have an order for payment on summons.

His Lordship also, following a course adopted by Mr. Justice *Chitty*, directed the summons to be sealed by the company.

Solicitors: *Lake, Beaumont & Lake.*

(1) *Ante*, p. 168.

J. B. D.

In re KIRWAN'S TRUSTS.

KAY, J.

1883

July 31; *Aug.* 1.

Power of Appointment — Valid Exercise by Will — Subsequent Bargain by Appointor with Appointee—Fraud on Power—Unattested Codicil—Wills Act (1 *Vict. c.* 26), *ss.* 9, 10 [*Revised Ed. Statutes, vol. viii., p.* 33]—24 *&* 25 *Vict. c.* 114 [*Revised Ed. Statutes, vol. xiii., p.* 1246.]

The donee of a power of appointment amongst his children, exercisable by deed or will, having one son and one daughter, by will in 1862 made a valid appointment to the daughter of the whole fund subject to the power. By a French settlement, not under seal, made in 1866, upon the marriage of his daughter he purported to appoint the whole fund to her, reserving to himself the power of disposing of a life interest in a portion of the fund in favour of his second wife; and by a holograph codicil, dated in 1871, made in *France*, and unattested, after reciting an arrangement made when his daughter was married between himself, his daughter, and her intended husband, that such second wife should have such provision, he in effect appointed that if his daughter and her husband should carry out this arrangement they should have the whole of the fund. This codicil was admitted to probate under 24 & 25 Vict. c. 114.

Held, that though admitted to probate the codicil was invalid as a testamentary exercise of the power (sects. 9 and 10 of the *Wills Act* not being repealed by 24 & 25 Vict. c. 114) and did not revoke the appointment by will.

Held, also, that the codicil could not be treated as a defective attempt to exercise the power by deed which the Court would aid.

Held, also, that the appointments by the settlement and codicil were frauds upon the power.

Held, also, that the arrangements made by the settlement and codicil involved a threat to revoke the will if they were not carried into effect, and that consequently the will, being an ambulatory instrument, was vitiated and became a fraud upon the power, although at the date of its execution it was not open to objection.

Observations on *Kennard* v. *Kennard* (1).

PETITION.

Under the will of his father *Clement Kirwan George Saint Lo Kirwan* had a life interest in a share of his father's residuary estate, with power by deed or will, to be executed in the presence of one or more witness or witnesses, to appoint such share to his son or daughter, or sons or daughters, in such shares and proportions as he thought fit.

George Saint Lo Kirwan was first married in December, 1839,

(1) Law Rep. 8 Ch. 227.

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to *Henriette Lazoe;* and there was issue of such marriage two children only, viz., the Petitioner, *Felix George Kirwan*, and the Respondent, *Mathilde Cesarine Kirwan*. His wife having died in the year 1850, *G. St. L. Kirwan* afterwards married *Marie Vitaline Victoire Breton*, but there was no issue of such second marriage.

On the 3rd of April, 1862, *G. St. L. Kirwan* made his will, which was in the French language, but was duly executed according to English law, and thereby, after reciting that he had then two children only, viz., *Felix*, then of the age of twenty-one years, and *Mathilde*, then of the age of seventeen years, and reciting also the power of appointment given to him by his father's will, he by virtue and in exercise of that power appointed that the share in which he took a life interest under that will should after his death go to his daughter *Mathilde* absolutely, and in case she should die in his lifetime (which event did not happen), then to his son *Felix* absolutely.

In the year 1866, *Mathilde Cesarine Kirwan* married the Respondent, *Flavien Breton*, and a settlement was made upon that marriage by a French instrument, not under seal, dated the 24th of June, 1866, to which she, her intended husband, and her father were all parties, and which contained an article whereof the following is a translation:—

"Previous to the appointment to be hereafter made Mr. *Kirwan* has explained as follows: that he is creditor in *London, England*, of a sum of 60,000 francs, or thereabouts, in reversion, the life interest thereof being alienated; this amount comes to him from the succession of his father and mother. According both to English law and to the testamentary disposition of the father and mother of Mr. *Kirwan* the latter cannot make over the reversion of this claim. He has only the right to appoint to which of his children he intends it should go at his death. Taking advantage of this faculty, Mr. *Kirwan* declares by these presents, in consideration of the intended marriage, to appoint Mademoiselle *Kirwan* (the future wife), his daughter, to receive this amount on the death of Mr. *Kirwan* alone, and to the exclusion of the other claimants to the latter's estate, and on account of the right of the said future wife in this estate. If necessary, he by these presents, and always in contemplation of the proposed marriage,

appoints to the future wife, his daughter, who accepts, all claims and personal securities he may have at the time of his death in *England*. He only reserves to himself the faculty of disposing of these securities and claims in favour of Mrs. *Marie Vitaline Breton Kirwan*, his second wife, of the reversion of 10,000 francs during the life of this lady, and which 10,000 francs ought to be invested in the name of Madame *Kirwan* for the life interest of the future wife for the reversion. Madame *Kirwan* (*née Breton*) will have the right to choose the mode of investment which will be made, provided it presents all guarantees for the capital."

On the 9th of May, 1871, *G. St. L. Kirwan*, being then resident in *France*, where he continued to reside until his death, made a codicil to his will. This codicil, which was entirely in his own handwriting, and was signed by him, but unattested, was as follows:—

"When I married my daughter, *Mathilde Cesarine Kirwan*, I expressed the desire of leaving to my wife, *Marie Vitaline Breton Kirwan*, a small revenue at my death through gratitude for having taken care, as a good mother, of my children during their infancy until their majority; but not having it in my power to do so, my daughter and her husband, *Flavien Breton*, proposed to me as follows: that if I would consent to leave them the whole of the sum of my share of the residue of my father's estate, *Clement Kirwan*, which I have the power to dispose of in favour of my children, that they would take the engagement at my death to have placed in my said wife's name for her life the sum of 10,000 francs at five per cent., so as to make her 500 francs per annum for her life, and at my wife's death the said sum to return to my said daughter. I have not the least doubt that they will execute their engagement; but in case they should not respect their signature, then I desire that one-half of the said sum shall be given to *Felix George Kirwan*; but in case that my said daughter and *Flavien Breton*, her husband, should respect my memory and their signature, then it is my will and desire that *Mathilde* and her husband should and may have the whole of the sum of my aforesaid share in a will signed by me in the year 1862, in the office of Mr. *Allaire*, notaire, at *Evreux*, in which all these conditions are mentioned, and also in her marriage contract."

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G. St. L. Kirwan died in March, 1880, and this codicil was together with his will of the 3rd of April, 1862, admitted to probate under the Act 24 & 25 Vict. c. 114, which provides that wills of personal estate made out of the *United Kingdom* by British subjects shall be held to be well executed for the purpose of being admitted to probate, if made according to the forms required by the place where the same is made.

After the death of *G. St. L. Kirwan*, *Flavien Breton* and *Mathilde Cesarine* his wife requested the trustees of *Clement Kirwan's* will to pay over to them the whole of the share so appointed as aforesaid, but the trustees were doubtful whether, having regard to the arrangement, contract, or promise according to which the second wife of *G. St. L. Kirwan* was to derive a benefit thereunder, the power had been well exercised. Accordingly, in November, 1880, they paid into Court under the *Trustee Relief Act* a sum of Consols representing *G. St. L. Kirwan's* share; and *Felix George Kirwan* now petitioned for the payment out to him of one moiety thereof, and for the carrying over of the other moiety to the separate account of his sister *Mathilde Breton.*

Amongst the evidence in opposition to the petition was an affidavit by *Flavien Breton* and *Mathilde* his wife, in which the wife stated as follows, par. 1:—"At the date of the will of my late father, *George Saint Lo Kirwan*, dated the 3rd of April, 1862, I was under the age of eighteen years. I did not prior to or at the time of the execution of the said will enter into any bargain, agreement, or arrangement with my said father to the effect that I would out of the moneys to be bequeathed thereby to me or otherwise make a provision for or confer any benefit upon his wife, *Vitaline Victoire Breton Kirwan*, or any bargain, agreement, or arrangement to the like effect." And in par. 2 both the deponents stated as follows:—"No agreement or bargain for the benefit of the said testator's said wife was ever entered into or made by us or either of us until shortly before our marriage, which took place in the year 1866. . . ."

Hastings, Q.C., and *C. Lyttelton Chubb*, for *Felix George Kirwan*, in support of the petition:—

There has been no valid exercise by *G. St. L. Kirwan* of the

power of appointment given to him by the will of his father *Clement Kirwan* over the share in question, and consequently that share must go as in default of appointment. The appointments purporting to be made by the settlement of 1866 and this codicil of 1871 were frauds upon the power, and are bad both at law and in equity. The will of the 3rd of April, 1862, whereby the power of appointment was first exercised, was an ambulatory instrument, and after it was made a bargain was entered into between the appointor and the appointee thereunder, that the appointee should share part of the fund appointed to her by the will with a person who was not an object of the power. This had the effect of tainting and invalidating the appointment by will which would otherwise have been good, because, it being a term of the bargain that if the appointee did not agree the prior appointment would be revoked, the transaction was in fact equivalent to a fresh conditional appointment of this character, and was bad accordingly. The case is thus brought within the principle laid down in *In re Marsden's Trust* (1) and *Topham* v. *Duke of Portland* (2), viz., that the existence of an intent on the part of an appointor to commit a fraud upon the power, as evidenced by the communication to the appointee after the appointment had been made of a purpose inconsistent with the power, was sufficient to vitiate the appointment, though the appointee had not before the appointment been privy to the arrangement. Moreover, although the appointment by the codicil was invalid, it nevertheless revoked the former appointment made by the will: *Quinn* v. *Butler* (3).

Kekewich, Q.C., and *J. G. Wood*, for the Respondents:—

The appointment made by the will of 1862 was a valid and effectual exercise of the power untainted by any bargain, and it never has been revoked because all the subsequent instruments were invalid.

The settlement was invalid as an exercise of the power by deed, because it is not an instrument under seal or executed conformably to the power within 22 & 23 Vict. c. 35, s. 12. The

(1) 4 Drew. 594. (2) Law Rep. 5 Ch. 40, 57.
(3) Law Rep. 6 Eq. 225.

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codicil was invalid as an exercise of the power by will, because it was unattested; and although it has been admitted to probate as a good testamentary instrument under 24 & 25 Vict. c. 114, s. 1, it is not a valid exercise of the power under the *Wills Act*, 1837, ss. 9, 10.

If, however, the appointment by the codicil should be held to be a good exercise of the power, then it was an appointment with a void condition attached to it, and the appointee is entitled to the property discharged from the condition: *Roach* v. *Trood* (1); *Palmer* v. *Locke* (2); *Onions* v. *Tyrer* (3).

[They also referred to *Kennard* v. *Kennard* (4).]

Horsburgh, for the trustees.

Hastings, in reply.

KAY, J.:—

This case raises some very curious and perplexing questions. [His Lordship here stated the facts and then proceeded:—]

Stopping at the codicil of the 9th of May, 1871, it is quite plain that this codicil proceeds upon a bargain which *Flavien Breton* and *Mathilde* had entered into with the appointor that if he would appoint the whole share to them they would make a provision out of it for the widow; a very proper thing in itself, but not a proper or competent execution of the power of appointment amongst children. The state of things is this: when the will of the 3rd of April, 1862, was made, there was an absolute appointment of the whole fund to the daughter *Mathilde*, which was not in pursuance of any bargain, but was a perfectly good appointment. Then in 1866, upon *Mathilde's* marriage, this bargain is made: that if she and her husband will make a certain provision out of the fund for the widow of the appointor, he will appoint the whole fund to *Mathilde*, and thereupon he makes first the provision which I have read in the marriage settlement of the 24th of June, 1866, which purports to be, if necessary, an appointment; and, secondly, the codicil of the 9th of May, 1871.

(1) 3 Ch. D. 429.
(2) 15 Ch. D. 294.
(3) 1 P. Wms. 343.
(4) Law Rep. 8 Ch. 227.

Now, the codicil was not attested, and therefore it did not fulfil the requisites either of the power or of the *Wills Act* (1 Vict. c. 26), but it was a good testamentary document under 24 & 25 Vict. c. 114, which provides "that every will and other testamentary instrument made out of the *United Kingdom* by a British subject (whatever may be the domicil of such person at the time of making the same, or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in *England* or *Ireland* to probate, and in *Scotland* to confirmation, if the same be made according to the forms required, either by the law of the place where the same was made, or by the law of the place where such person was domiciled." This being a good testamentary instrument by the law of the domicil of *George Saint Lo Kirwan*, which I understand was *France* at the time, although not executed as required by the *Wills Act*, has under the Act which I have referred to been admitted to probate in *England*, and the documents admitted to probate are two, *i.e.*, the will of the 3rd of April, 1862, and the codicil of the 9th of May, 1871.

Now I have to consider what is the effect of all this. In the first place, it is clear that the codicil is a void appointment in equity, that is to say, supposing it to be otherwise a good appointment, equity would not allow it to stand, because it proceeds upon a bargain which is contrary to the nature of the power. The same is to be said of the appointment made by the settlement. Then the first question is, can the appointment be aided? Now it is clear that an appointment before the *Wills Act*, although purporting to be by will, if not made with the formalities then required to make a perfect will, and not made with the formalities required by the terms of the power, would yet be aided in equity, if it were in favour of a child. For that I need only refer to the case of *Wilkes* v. *Holmes* (1), and the later case of *Lucena* v. *Lucena* (2). But before this codicil was made, the *Wills Act* had passed, and the *Wills Act* provides by its 10th section, "that no appointment made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required." Then the section provides that a will

(1) 9 Mod. 485. (2) 5 Beav. 249.

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executed as required by the Act shall be a valid execution of a power of appointment. The manner thereinbefore required included attestation by two witnesses, and here there is no attestation at all. It is said that nevertheless, as this power might be executed by deed or will, the Court may treat it as a valid execution by deed. For that the case of *Kennard* v. *Kennard* (1) was referred to, where the power was in effect by deed or will, and a memorandum was left by the appointor which contained the words: "If I die suddenly I wish my eldest son, *Robert Bruce Kennard*, to have it" (which is explained to be "the money I had with my sister, Mrs. *Mann*," meaning the money over which she had a power of appointment), "my intention is to make it over to him legally if my life is spared." That memorandum was dated in 1870, after the *Wills Act*, and the question was whether that memorandum, not being attested, was a good execution of the power, and it was held to be a good execution of the power, being in favour of a child. But upon what ground. Was it a good execution of the power because the instrument was not a will at all, but a memorandum, the formalities of a deed being supplied, or was it a memorandum which was considered to be a will and yet was treated as a deed? It seems to me a very strong thing indeed if the memorandum was really a testamentary document, to say, after the provision in the *Wills Act* that "no appointment made by will in exercise of the power shall be valid unless the same be" in effect attested by two witnesses—that the defect could be supplied, and I must read this decision as meaning not that the memorandum being considered to be a testamentary document was in equity turned into a deed, but that the Court did not consider that the document was testamentary, but treated it as a mere memorandum, which might, by aid of the Court of Equity, be turned into a deed, by supplying the defective execution. I think that appears to be the case from the language of both the judgments, but more especially from the language of Sir *George Mellish*. Lord Justice *James* says (2): "Here the lady had power to give the property by an instrument sealed and delivered. By an instrument not sealed and delivered she expresses her intention that her son shall have the property which is subject to the power,

(1) Law Rep. 8 Ch. 227. (2) Law Rep. 8 Ch. 230.

and the case is one in which a Court of Equity will relieve against the defective execution." Sir *George Mellish* says: "I am of the same opinion. A doubt which I felt, whether this instrument was not intended to be a will, and whether an instrument intended to operate as a will, but incapable of doing so, could operate in another way, has been removed during the argument. The donee of the power expresses an intention to give the property by a more formal instrument, but still shews her intention to give it. She means in any event to give it, but to do so by a more formal instrument if her life is spared." Now I must take that as meaning: "I have come to the conclusion," I am paraphrasing Sir *George Mellish's* words, "that the document is not intended to be a will, and therefore the negative words in the 10th section of the *Wills Act* do not apply to the case." I must say I should require a good deal of consideration before I could hold that a document plainly intended to be a will, in a testamentary form, but without the express requisites required by the *Wills Act* or by the terms of the power, could be aided in a Court of Equity by turning it into a deed. Therefore I do not think it would be possible to treat this codicil as being a deed for the purpose of supplying a defective execution. It is a codicil, it is a testamentary instrument, and has been admitted to probate as such. But, then, it was said the defective execution may nevertheless be supplied, because it is a testamentary instrument. It is a good testamentary instrument, and its only defect is its want of attestation. But the *Wills Act* says that "no appointment made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required," that is to say, in the presence of and attested by two witnesses. The later Act, 24 & 25 Vict. c. 114, does not refer to that clause, nor, indeed, does it refer to a power of appointment at all. It only does this. It makes a will executed abroad by a British subject a good will if it be such a document as is recognised as a will by the law of that place. But it does not at all touch or interfere with the negative provision in the *Wills Act*, namely, that no testamentary appointment can be made unless it is attested by two witnesses. Therefore, I do not think it would be possible to treat this codicil

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as being a good and valid appointment either at law or in equity: *Sugden* on Powers (1).

If the codicil could be treated to any extent as a good appointment it is an appointment which is in some respects inconsistent with the appointment made by the will of the 3rd of April, 1862. Therefore, although there are no words of revocation in it, being an inconsistent provision, it might be held to revoke the will; and it might possibly be held to revoke the will if it were a good appointment at law, although the appointment may be void in equity because it was in fraud of the power. I do not give any opinion on that subject at present. But being void both at law and in equity as an appointment, I do not see how it can be treated as a revocation of the prior will.

However, there is since the prior will an appointment by the settlement, and that is an appointment which most certainly might be aided in a Court of Equity, and made a good appointment; and if the appointment be inconsistent with the will, as in truth it would be (it is an appointment of the whole to *Mathilde*, but in terms which are not contained in the will), that appointment would be of course a revocation of the will, because it is dealing with the absolute interest. Still it is not a revocation at law; because it is not an appointment at law. It is a bad appointment at law, and can only be made into a good appointment in equity. And then arises this curious question. The appointment being clearly an improper appointment in equity, because it is a fraud on the power, can equity aid it so as to destroy the previous good appointment by the will of 1862, and yet set it aside because it is a fraud upon the power? I must say it seems to me impossible that a Court of Equity could come to that conclusion.

But there remains this point; supposing that none of the appointments can be treated as appointments which revoke the will of 1862, is that will now, in the view of a Court of Equity, a good appointment. The argument is this; the will of 1862 was clearly not intended to operate alone. That is beyond all question. If it were in any way left to operate it would be left

(1) 8th Ed. p. 559.

to operate upon this principle, that since it was made there was a bargain with *Mathilde* that if she took the whole property she would dispose of part of it for the benefit of the widow. That would be, of course, an improper bargain, and would invalidate any appointment made upon such a bargain.

Now, the argument is that the will is an ambulatory instrument, and if there was such a bargain, and the will was intended to operate and carry the whole fund by way of appointment to *Mathilde*, but upon the terms that she was to make out of it this provision, this will being an ambulatory instrument the bargain must be treated as containing a term of this kind: "If you do not do this I will revoke the will." I think a Court of Equity has ample power to say (although I do not remember any case of the kind, nor has any been cited to me), that the appointment if allowed to remain on these terms would be an invalid appointment in equity, because it is just the same as if a new appointment had been made at the time the language was used, and the new appointment had been made upon those terms. I conceive the arm of the Court to be quite long enough to reach a case of that kind. Is this such a case? I think it is for this reason. In the codicil which I have read there are these words: "In case my daughter and *Flavien Breton* her husband shall respect my memory and their signature" (that is shall carry out this bargain which I have made with them), "then it is my will and desire that *Mathilde* and her husband should and may have the whole of the sum of my aforesaid share in a will signed by me in the year 1862, in which all these conditions are mentioned." That means the will which I have read. I can read on the face of this codicil: "My intention is that she shall have that which I have appointed to her by a will of 1862 if she carries out this bargain." That brings the appointment by the will of 1862 within the controlling power of the Court of Equity, and I must hold that it is an invalid appointment in equity. Consequently the fund will go as in default of appointment.

Solicitors for the Petitioners: *Russell, Son, & Scott.*
Solicitors for Respondents: *A. F. & R. W. Tweedie.*
Solicitors for trustees: *Rogers, Sons, & Russell.*

W. W. K.

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Nov. 9, 13.

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Practice—Lands Clauses Act, 1845, *Re-investment of Moneys paid into Court under—Application by Summons in Chambers—Judicature Acts*, 1873, *ss.* 16, 24, 73; 1875, *s.* 17; *Appellate Jurisdiction Act*, 1876, *s.* 17; *Judicature Act*, 1881, *s.* 19—18 & 19 *Vict. c.* 134, *s.* 16 [*Revised Ed. Statutes, vol. xii., p.* 813]—*Rules of Supreme Court*, 1883, *Order* LV., *r.* 2, *sub-s.* 7, *not ultrà vires.*

The 16th section of the *Despatch of Business, Court of Chancery, Act* (18 & 19 Vict. c. 134), giving power to the Lord Chancellor, with the advice and assistance of the Master of the Rolls and the Vice-Chancellors, or any two of them, to make general orders as to the business to be disposed of in Chambers, has not been repealed either expressly or by implication; and the effect of the 76th section of the *Judicature Act* of 1873 was to substitute three Judges of the High Court of Justice for the three Vice-Chancellors mentioned in such 16th section.

Accordingly such power may now be properly exercised by the Lord Chancellor, with the advice and assistance of the Master of the Rolls, and any two Judges of the High Court of Justice, and the fact that the Rule Committee who framed the Rules of the Supreme Court, 1883, comprised other Judges as well as these, does not invalidate the exercise of the power.

Therefore it appearing from the reference in Order LV., r. 2, sub-s. 7, to the 14th of August, 1855, the date on which the *Despatch of Business, Court of Chancery, Act*, received the royal assent, that the Rule Committee intended to act under the powers conferred by that Act, the order contained in such sub-section is not *ultrà vires*, and in accordance therewith all applications for interim and permanent investments and for payment of dividends under the *Lands Clauses Consolidation Act*, 1845, and any other Act passed before the 14th of August, 1855, whereby the purchase-money of any property sold is directed to be paid into Court, must be made upon summons at Chambers.

PETITION.

This was an application by petition in the matter of the *Lands Clauses Consolidation Act*, 1845, for the re-investment in land of moneys paid into Court under that statute in respect of lands taken by the *London, Chatham, and Dover*, and *East London Railway Companies.*

Order LV., r. 2, sub-s. 7, of the Rules of the Supreme Court, 1883, provides (*inter alia*) that applications for investment "under the *Lands Clauses Consolidation Act*, 1845, and any other Act passed before the 14th of August, 1855, whereby the purchase-money of

any property sold is directed to be paid into Court," shall be disposed of in Chambers by the Judges of the Chancery Division.

Upon the opening of the petition, which had been presented after the new rules had come into operation, it was objected on behalf of the two railway companies, who were Respondents, that under the sub-section above referred to, the application ought to have been made by summons in Chambers, and accordingly that they were not liable to pay any larger sum for costs than they would have been bound to pay if the application had been by summons in Chambers.

Sir *Arthur Watson*, for the Petitioners :—

The question is a question of jurisdiction, and Order LV., r. 2, sub-s. 7, is *ultrà vires*. The *Lands Clauses Act*, 1845, contains an express enactment that applications of this character shall be made to the Court by petition; and where a summary jurisdiction to make orders in a particular manner in open Court has been conferred upon the Court of Chancery by Act of Parliament, nothing less than an express enactment in another Act of Parliament passed for the purpose can alter or extend the jurisdiction of the Court so as to give it the power of making such orders in any other way. The importance of this from a public point of view is manifest.

Is there then anything to give to Order LV., r. 2, sub-s. 7, this parliamentary force? By the 18 & 19 Vict. c. 134, s. 16, after referring to the power possessed by the Court of Chancery of making certain orders upon petition or motion in a summary way, but not in Chambers, it was enacted that the business to be disposed of by the Master of the Rolls and the Vice-Chancellors at Chambers should comprise such of the matters in respect of which the Court could exercise its summary jurisdiction as the Lord Chancellor, with the advice and assistance of the Master of the Rolls and Vice-Chancellors, or any two of them, should by general order direct. But this enactment was in effect repealed by the *Judicature Act* of 1873, which, after transferring by sect. 16 the jurisdiction of the Court of Chancery to the High Court of Justice, provided in sect. 23 that such jurisdiction should

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be exercised so far as regards procedure and practice as provided by the Act or by such rules and orders as should be made pursuant to the Act; and where no special provisions should be contained in the Act, or in such rules, in the same manner as by the Courts whose jurisdiction had been transferred; and further, in sects. 68 to 74 gave powers to make rules for regulating the procedure and practice of the new High Court.

This accordingly takes away any other power of making rules.

What then follows? By the *Judicature Act* of 1875 under sects. 16 and 21, and the schedules to the Act, sects. 68 to 74 of the Act of 1873 are repealed, and the Rules of Court, 1875, are brought into operation. Then in sect. 17 a power is given to make further or additional rules. But this power is limited to the making of rules for regulating the pleading, practice, and procedure of the High Court of Justice and Court of Appeal respectively, and does not enable the framers of rules thereunder to repeal an Act of Parliament or affect the jurisdiction of the Court. Again, in sect. 22, it is enacted that where any provisions in respect of the practice or procedure of any Court the jurisdiction of which had been transferred, were contained in any Act of Parliament, Rules of Court might be made for modifying such provisions to any extent deemed necessary for adapting the same to the High Court of Justice. But it cannot be said that this is an adaptation of procedure rendered necessary by the passing of the *Judicature Act*, for that Act had been in operation for eight years before this rule was made, during which period orders of this character have been continually made upon petition.

Then by the 17th section of the *Appellate Jurisdiction Act*, 1876, it is provided that all rules of Court to be made after the passing of that Act shall be made by any three or more of the following persons of whom the Lord Chancellor shall be one, viz., the Lord Chancellor, the Lord Chief Justice of *England*, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other Judges of the Supreme Court. Finally by the 19th section of the *Supreme Court of Judicature Act*, 1881, under which the recent rules in question are expressed to be made, the power of making Rules of Court conferred by sect. 17 of the Act of 1876, is vested in and

exercisable by any five or more of the following persons of whom the Lord Chancellor shall be one, viz., the Lord Chancellor, the Lord Chief Justice of *England*, the Master of the Rolls, the President of the Probate Divorce and Admiralty Division of the High Court, and four other Judges of the Supreme Court, to be from time to time appointed by the Lord Chancellor.

I contend, therefore, that while the rules in question cannot be shewn to have any other parliamentary force, they could not have been made under the Act 18 & 19 Vict. c. 134, for the following reasons. First, that by the course of legislation that statute has been repealed either expressly or by implication. Secondly, that if not so repealed, it has, from change of circumstances, become inoperative, for it dealt with the Court of Chancery, which no longer exists; and the power to make rules under it was to be exercised by the Lord Chancellor with the Master of the Rolls and Vice-Chancellors, or any two of them, and there is now only one Vice-Chancellor, and he was not one of the Rule Committee, and moreover it gave no power to the Supreme Court to make rules, the Judges of which do not stand in the same position as the Vice-Chancellors. Thirdly, that even if that Act was still operative, these rules do not purport and were not intended to be made under it, for the Rule Committee were expressly appointed under the 19th section of the Act of 1881 for the purpose of making rules under the Act of 1875, and there is no reference whatever to the 18 & 19 Vict. c. 134; and, lastly, that if the new rules were intended to be made under the former Act, the powers conferred thereby have not been validly exercised, as no Judge of the Chancery Division was on the committee.

He also referred to *Morgan's* Chancery Acts and Orders (1).

Hornell, for the *London, Chatham, and Dover Railway Company*:—

This is purely a question of procedure, and not a question of jurisdiction at all. But even if it is a question of jurisdiction, or a mixed question of jurisdiction and procedure, the jurisdiction may be altered or enlarged by rules duly made. This was done

(1) 4th Ed. pp. 146, 147; 255.

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be exercised so far as regards procedure and practice as provided by the Act or by such rules and orders as should be made pursuant to the Act; and where no special provisions should be contained in the Act, or in such rules, in the same manner as by the Courts whose jurisdiction had been transferred; and further, in sects. 68 to 74 gave powers to make rules for regulating the procedure and practice of the new High Court.

This accordingly takes away any other power of making rules.

What then follows? By the *Judicature Act* of 1875 under sects. 16 and 21, and the schedules to the Act, sects. 68 to 74 of the Act of 1873 are repealed, and the Rules of Court, 1875, are brought into operation. Then in sect. 17 a power is given to make further or additional rules. But this power is limited to the making of rules for regulating the pleading, practice, and procedure of the High Court of Justice and Court of Appeal respectively, and does not enable the framers of rules thereunder to repeal an Act of Parliament or affect the jurisdiction of the Court. Again, in sect. 22, it is enacted that where any provisions in respect of the practice or procedure of any Court the jurisdiction of which had been transferred, were contained in any Act of Parliament, Rules of Court might be made for modifying such provisions to any extent deemed necessary for adapting the same to the High Court of Justice. But it cannot be said that this is an adaptation of procedure rendered necessary by the passing of the *Judicature Act*, for that Act had been in operation for eight years before this rule was made, during which period orders of this character have been continually made upon petition.

Then by the 17th section of the *Appellate Jurisdiction Act*, 1876, it is provided that all rules of Court to be made after the passing of that Act shall be made by any three or more of the following persons of whom the Lord Chancellor shall be one, viz., the Lord Chancellor, the Lord Chief Justice of *England*, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other Judges of the Supreme Court. Finally by the 19th section of the *Supreme Court of Judicature Act*, 1881, under which the recent rules in question are expressed to be made, the power of making Rules of Court conferred by sect. 17 of the Act of 1876, is vested in and

exercisable by any five or more of the following persons of whom the Lord Chancellor shall be one, viz., the Lord Chancellor, the Lord Chief Justice of *England*, the Master of the Rolls, the President of the Probate Divorce and Admiralty Division of the High Court, and four other Judges of the Supreme Court, to be from time to time appointed by the Lord Chancellor.

I contend, therefore, that while the rules in question cannot be shewn to have any other parliamentary force, they could not have been made under the Act 18 & 19 Vict. c. 134, for the following reasons. First, that by the course of legislation that statute has been repealed either expressly or by implication. Secondly, that if not so repealed, it has, from change of circumstances, become inoperative, for it dealt with the Court of Chancery, which no longer exists; and the power to make rules under it was to be exercised by the Lord Chancellor with the Master of the Rolls and Vice-Chancellors, or any two of them, and there is now only one Vice-Chancellor, and he was not one of the Rule Committee, and moreover it gave no power to the Supreme Court to make rules, the Judges of which do not stand in the same position as the Vice-Chancellors. Thirdly, that even if that Act was still operative, these rules do not purport and were not intended to be made under it, for the Rule Committee were expressly appointed under the 19th section of the Act of 1881 for the purpose of making rules under the Act of 1875, and there is no reference whatever to the 18 & 19 Vict. c. 134; and, lastly, that if the new rules were intended to be made under the former Act, the powers conferred thereby have not been validly exercised, as no Judge of the Chancery Division was on the committee.

He also referred to *Morgan's* Chancery Acts and Orders (1).

Hornell, for the *London, Chatham, and Dover Railway Company*:—

This is purely a question of procedure, and not a question of jurisdiction at all. But even if it is a question of jurisdiction, or a mixed question of jurisdiction and procedure, the jurisdiction may be altered or enlarged by rules duly made. This was done

(1) 4th Ed. pp. 146, 147; 255.

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This power to make rules was originally given by sect. 17 of the *Supreme Court of Judicature Act*, 1875.

The rules so made are to be laid before each House of Parliament within forty days (Act of 1875, s. 25), and may be annulled by Order in Council upon an address presented to Her Majesty by either House of Parliament. Sect. 17 of the Act of 1875 gives to the Supreme Court, after the commencement of that Act, the same power of making rules as by the former part of the section, that is, to make any further or additional rules, amongst other things, "for regulating any matters relating to the practice and procedure of the High Court of Justice and Court of Appeal respectively."

In one sense this is a matter of procedure, but where a statute has especially enacted that the application to the Court of Chancery for a particular purpose shall be by petition, I agree that it is a question not merely of procedure but also of jurisdiction whether the application can be made in any other mode.

In the year 1845, when the *Lands Clauses Act* was passed, the Judges of the Court of Chancery did not sit in Chambers, they were only empowered to do so in 1852 by 15 & 16 Vict. c. 80, and it seems to me very difficult to hold that the special jurisdiction conferred upon the Court of Chancery by petition under the *Lands Clauses Act*, 1845, could be enlarged or altered by enabling the Chancery Judges to make the like order upon summons in Chambers upon any less authority than that of another Act of Parliament expressly giving a power to make an order for the purpose.

The real question, therefore, seems to be whether the rule in question could be made, and was made, under the authority of 18 & 19 Vict. c. 134.

It is argued (1), that this statute has been repealed either expressly or by implication; (2), that if not repealed it has from change of circumstances become inoperative; (3), that even if operative the new rules were not intended to be made under it; and (4), that if so intended the power given by that Act has not been duly exercised.

The first of these contentions rests upon sect. 23 of the *Supreme*

Court of Judicature Act, 1873, which provides that the "jurisdiction" thereby transferred to the High Court and Appeal Court shall be exercised, "so far as regards procedure and practice," in the manner provided by that Act, or by such rules and orders as may be made pursuant to that Act. And when no special provision is contained in the Act, or in any such rules or orders, then "as nearly as may be in the same manner as the same might have been exercised by the respective Courts from which such jurisdiction shall have been transferred."

The subsequent sections of that Act, 68 and 74, which gave power to make Rules of Court, were repealed by sect. 33 of the Act of 1875, which by sect. 17 gave a new power of making rules, subsequently modified by the Acts of 1876 and 1881, to which I have referred, and it is therefore insisted that whatever might have been the effect of rules made under the Act of 1873, the 23rd section of that Act takes away any other power of altering the provisions of the *Lands Clauses Act* by means of rules.

But it is a well settled doctrine that an express provision in an Act of Parliament like this of 18 & 19 Vict. c. 134, is not repealed by general words in a subsequent statute which does not refer to it unless the two statutes are necessarily inconsistent with one another: *Thorpe* v. *Adams* (1) and *Hill* v. *Hall* (2). I am of opinion that there is not in this case any such necessary inconsistency, and that there is no express or implied repeal. Indeed, the argument involves this inconsistency. The word "jurisdiction" no doubt occurs in sect. 23, but the power to make rules given by the Act of 1873 was to regulate procedure and not to alter the jurisdiction, and according to the argument this is not a mere question of procedure but of jurisdiction.

Then has the 18 & 19 Vict. c. 134, become inoperative? The power thereby given was to the Lord Chancellor with the advice and assistance of the Master of the Rolls and the Vice-Chancellors, or of any two of them.

There is but one Vice-Chancellor, and he did not join in making these rules. But sect. 16 of the Act of 1873 transfers the jurisdiction of the Court of Chancery to the High Court; sect. 24 empowers every Judge to give to any plaintiff, petitioner,

(1) Law Rep. 6 C. P. 125. (2) 1 Ex. D. 411.

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or defendant equitable relief; and sect. 76 provides that all Acts of Parliament relating to the Courts and Judges whose jurisdiction is transferred shall be construed and take effect as if the High Court and the Judges thereof respectively, as the case may be, had been named therein instead of such Courts or Judges whose jurisdiction is so transferred. "And in all cases not hereby expressly provided for in which, under any such Act, the concurrence or the advice or consent of the Judge, or any Judges, or of any number of the Judges, of any one or more of the Courts whose jurisdiction is hereby transferred to the High Court of Justice is made necessary to the exercise of any power or authority capable of being exercised after the commencement of this Act, such power or authority may be exercised by and with the concurrence, advice, or consent of the same or a like number of Judges of the said High Court of Justice."

This enactment seems expressly to substitute three Judges of the High Court for the three Vice-Chancellors mentioned in 18 & 19 Vict. c. 134, s. 16.

I have therefore not the least hesitation in holding that by virtue of that section the Lord Chancellor might by an order made with the advice and assistance of the Master of the Rolls and three Judges of the High Court, or of any two of such learned persons, under sect. 16 of 18 & 19 Vict. c. 134, make a general order directing that applications for re-investment under the *Lands Clauses Act* might thereafter be made in Chambers.

Then should such three Judges be Judges of the Chancery Division? I do not think that can be necessary, because all the Judges of the High Court now have equitable jurisdiction.

There remain the questions whether the new rules were intended to be made under this authority, and, if intended, whether the authority has been duly exercised.

The Rule Committee who signed the new rules were appointed by the Lord Chancellor on the 12th of January, 1883, and the appointment is expressed to be made "in pursuance of the 19th section of the Supreme Court of Judicature Act, 1881," for the purpose of making Rules of Court as "mentioned in" that Act. There is no reference in that appointment to 18 & 19 Vict. c. 134. But in the Order LV., rule 2, sub-sect. 7, the validity of

which is now in question, authority is given for applications being made in Chambers for interim and permanent investment, and for payment of dividends under the *Lands Clauses Consolidation Act*, 1845, and any other Act passed before the 14th of August, 1855. Now that is the date of the royal assent to 18 & 19 Vict. c. 134. There is, therefore, no kind of doubt that the learned Judges who framed the new rules had that statute before them, and in making this rule intended to act under the powers thereby conferred.

Then could they so validly act? As I have pointed out, the Lord Chancellor could, with the advice and assistance of the Master of the Rolls and any three Judges of the High Court, or with the advice and assistance of any two of them. The Master of the Rolls and also two Judges of the High Court were upon the Rule Committee, and it seems to me impossible to maintain that, because the Lord Chancellor also obtained the advice and assistance of more than these and of some of the Lords Justices of Appeal that the power given by the Act 18 & 19 Vict. c. 134, was not validly exercised. I am therefore of opinion that this rule is not *ultrà vires*. The companies who are Respondents are accordingly only liable to pay such costs of this petition as they would have incurred if the matter had been brought before a Judge in Chambers by summons.

Solicitors: *The City Solicitor; John White; Wilson, Bristows, & Carpmael.*

W. W. K.

KAY, J.
1883
Nov. 24, 28.

In re LUDDY.
PEARD *v.* MORTON.

[1882 L. 2982.]

Will—Gift of Property to Trustees to pay Debts and Annuities, and to convey, &c., Residue to Son absolutely—Death of Son leaving Children, Trustees to convey to them absolutely—Death of Son in Testatrix's Lifetime, without leaving Children, Gift over—Son survived Testatrix, and entitled absolutely.

Testatrix gave all her real and personal estate to trustees in trust to pay all her debts, &c., and certain annuities, and then as to the residue of her estate directed them to convey, assign, or otherwise assure the same unto and to the use of her son, his heirs, executors, &c., absolutely. And if her son should marry, and should die leaving children who should live to attain the age of twenty-one years, the trustees were to convey, &c., the residue to such children equally, as tenants in common absolutely, but if her son should die in her lifetime without leaving children or a child surviving, then the trustees were to convey, &c., the residue to the persons named for their absolute use and benefit. The son married after the date of the will in the lifetime of the testatrix, survived the testatrix, and had children living:—

Held, that death leaving children meant death in the lifetime of the testatrix, and that that not having happened, the son became, subject to the payment of debts and annuities, entitled absolutely to the residue.

ELIZA ANN LUDDY, who died in November, 1876, by her will made in September, 1872, devised and bequeathed all her real and personal estate to the use of her son *Charles Broughton Luddy* and the Defendant *Mary Elizabeth Morton*, their heirs, executors, administrators, and assigns, upon trust to apply and dispose of the same according to the directions thereinafter contained; "that is to say, I direct my said trustees to pay all my just debts and funeral and testamentary expenses as soon as may be after my death."

She then directed them to pay certain annuities, and continued:—"And as to all the rest, residue, and remainder of my said real and personal estate, I direct my said trustees to convey and assign or otherwise assure the same unto and to the use of my said son *Charles Broughton Luddy*, his heirs, executors, administrators, and assigns, absolutely, and if my said son shall marry

and shall die leaving children of such marriage who shall live to attain the age of twenty-one years, then I direct my said trustees to convey, assign, and otherwise assure the said residue to and amongst such children in equal shares as tenants in common, and if only one such child, then the whole to such one child absolutely; but if my said son *Charles Broughton Luddy* shall die in my lifetime without leaving a child or children him surviving, then I direct my said trustees to convey, assign, or otherwise assure the said residue of my said real and personal estate to and amongst the widow of my said son, if any living at his decease, and the said *Mary Elizabeth Morton* and *Eliza Theresa Luddy*, in equal shares, for their absolute use and benefit as tenants in common. I appoint my said son, *Charles Broughton Luddy*, and my said sister *Mary Elizabeth Morton*, executors of this my will."

C. B. Luddy married in 1873. He and his wife were still living, and they had three children who were Defendants in the action.

C. B. Luddy, considering that he was entitled absolutely to the residue, mortgaged it. In 1879 he was adjudicated bankrupt, and the trustee in bankruptcy in November, 1881, assigned all the estate, &c., of *C. B. Luddy*, under the will of the testatrix to the Plaintiff absolutely, subject to the incumbrances affecting the same. The debts of the testatrix had long since been paid, but the annuities were still subsisting.

Hastings, Q.C., and *W. King*, for the Plaintiff, submitted that, upon the true construction of the will, *C. B. Luddy* was entitled absolutely to all the residue subject to the payment of debts and the annuities; that the Plaintiff was entitled to a declaration to that effect; and that under the indenture of November, 1881, he was entitled to the residue.

[They referred to *Da Costa* v. *Keir* (1); *O'Mahoney* v. *Burdett* (2); *Ingram* v. *Soutten* (3); *Olivant* v. *Wright* (4), and *Clayton* v. *Lowe* (5).]

(1) 3 Russ. 360.
(2) Law Rep. 7 H. L. 388.
(3) Law Rep. 7 H. L. 408.
(4) 1 Ch. D. 346.
(5) 5 B. & A. 636.

KAY, J.
1883
In re LUDDY.
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W. Pearson, Q.C., and *Northmore Lawrence*, for the trustees of the will and the infant children:—

Looking at the existing state of circumstances, *C. B. Luddy* cannot say that the time has arrived when he is entitled to ask for a conveyance. The trustees are directed to dispose of the *corpus* according to the directions in the will, and there is no direction to pay anything out of the income. The debts and annuities are to come out of the estate, which consists of houses, and which ought to be realized and the proceeds brought into Court. The time not having arrived for a conveyance, the debts and annuities having to be provided for if *C. B. Luddy* should die leaving issue, they will be entitled under the executory gift over as it applies to death at any time whenever the contingency may happen. *C. B. Luddy* will not be entitled until the death of the last surviving annuitant. To give effect to the will as a whole, there must be the marriage of *C. B. Luddy* and children born of it who shall attain the age of twenty-one, and after the death of *C. B. Luddy* a conveyance to the children equally as tenants in common absolutely. This is not a case where the trustees can set apart a sum to answer the annuities, as they are to pay out of the estate and not out of the income. They are to convey only after the annuities shall have been satisfied.

[They referred to the cases of *Bowers* v. *Bowers* (1); *Cooper* v. *Cooper* (2), where surprise was expressed at the doctrine laid down in *Clayton* v. *Lowe* (3), and *Edwards* v. *Edwards* (4).

Hastings, in reply.

Nov. 28. KAY, J., after stating the will above set forth, said:—

C. B. Luddy survived the testatrix and is now living, and the question is whether he became absolutely entitled to the residue. That depends upon the further question whether the death of *C. B. Luddy*, leaving children, referred to in the will, means his death in the lifetime of the testatrix, or his death before some

(1) Law Rep. 5 Ch. 244.
(2) 1 K. & J. 658.
(3) 5 B. & A. 636.
(4) 15 Beav. 357.

other event, or his death whenever it may happen. When a will refers to the death of a legatee coupled with a contingency—as death without leaving issue—that *primâ facie* means death whenever it may happen, as was decided in two cases in the House of Lords, *O'Mahoney* v. *Burdett* (1) and *Ingram* v. *Soutten* (2); but the context may shew that death before a particular period was really intended. For example, suppose there was a gift to *A.* absolutely, with a direction to transfer the property to him, and then a further direction that if he should die leaving children the property should go to such children, but if he should die without leaving children, to *B.* Such a series of provisions amount, in fact, to a gift to *A.*, and if he die, over, and then the direction to transfer, which contemplates that in some event *A.* is to have the disposal of the fund, would be defeated if death were construed to mean death at any time. That was the case of *Da Costa* v. *Keir* (3) as explained by Lord *Selborne* in *O'Mahoney* v. *Burdett*. In this case the son is evidently intended to have an absolute interest which he may dispose of in some event, because of the direction to convey and assign the property to him absolutely. But the alternatives on which it is given over do not amount to a gift over upon his death in any event. They are if he die leaving children who shall attain twenty-one, or if he die without leaving children in the lifetime of the testatrix, so that if he died leaving children who should not attain twenty-one, or if he survived the testatrix and died after her without leaving children, those events are unprovided for, and there is no defeasance of his absolute interest.

Still it has been argued that if the death referred to be death at any time, the son can never be entitled to a conveyance, because it cannot be told until he be actually dead, whether he will leave a child or not. That argument has been met in two ways: First, that the conveyance may be to him in such form as to be defeasible in case he should leave children or a child who should attain twenty-one; and secondly, that the period at which the conveyance is to be made can only be when the debts and

(1) Law Rep. 7 H. L. 388. (2) Law Rep. 7 H. L. 408.
(3) 3 Russ. 360.

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annuities shall have been satisfied, and consequently the will must be read as if the executory limitation were in case of his death before such satisfaction. I am unable to adopt either of these contentions. The former of them seems to me directly contrary to the words of the will, which contemplate the conveyance and assignment of real and personal estate to the son absolutely, or in the alternative a conveyance and assignment to his children absolutely. If the children become entitled there is not to be any conveyance to the father but only to the children. As to the second argument no authority was cited in support of it, and I am not aware of any case in which the uncertain time when debts shall have been paid and annuities satisfied has been adopted as the time when a limitation over is to take effect, unless there were very clear words compelling such construction. It would enable the father himself to defeat the limitation to his children by satisfying the debts and buying up the annuities, and then calling for a transfer of the property.

Technical rules of construction are only to be adopted where from the whole will no intention can be discovered inconsistent with them. If the provisions of this will cannot be satisfied by adopting the technical rule, the Court is bound to resort to some other construction.

The primary object of the bounty of the testatrix, so far as the disposition of the residue was concerned, was plainly her son. He was to have a conveyance and assignment of such residue to himself absolutely, if he survived her. That I must take to be the paramount intention. It seems to me improper to put such a construction upon the trust for the children as would make it impossible ever to make a conveyance and assignment to the son, and I feel, therefore, compelled to come to the conclusion that in this will, death leaving children, means death in the lifetime of the testatrix, and, that not having happened, the son became entitled absolutely subject to the debts and annuities. The mention in the will of death in the lifetime of the testatrix, in the event of the son not leaving children, is not necessarily inconsistent with this construction. It points to her death as being the time for distributing the property in one event, but does not

of necessity exclude the construction that it may be so in another event as well. If authority be necessary, this construction seems to me to be supported by *Whiting* v. *Force* (1); *Wheable* v. *Withers* (2) and by the speech of the present Lord Chancellor in *O'Mahoney* v. *Burdett* (3) in the House of Lords.

Solicitors: *J. D. Peard; Poole, Hughes, & Poole.*

(1) 2 Beav. 571. (2) 16 Sim. 505.
(3) Law Rep. 7 H. L. 388.

T. F. M.

CHITTY, J.

1883

Nov. 30.

In re GREYS BREWERY COMPANY.

Winding-up—Examination of Witnesses before an Examiner—Creditors' Right of attending—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 115 [*Revised Ed. Statutes, vol. xiv., p.* 227]—*Bankrupt Law Consolidation Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 120—*General Order of the* 11*th of November*, 1862, *Rule* LX.—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 96.

Admitted creditors of a company in course of winding-up have not a general right under rule LX. of the General Order to regulate the proceedings under the *Companies Act*, 1862, of the 11th of November, 1862, to attend an examination of witnesses before an examiner summoned under sect. 115 of the *Companies Act*, 1862. But the Court in its discretion may allow the attendance.

The word "proceedings" in that rule cannot be held to include an examination before an examiner which is strictly of a private character.

In re Empire Assurance Corporation (1) and *In re Merchants' Company* (2) discussed.

THIS was a motion on behalf of the official liquidator of the *Greys Brewery Company*, which was in course of liquidation, that Mr. *Harrison*, who was formerly secretary and afterwards managing director of the company, and Mr. *Thompson*, a shareholder of the company, should attend at their own expense before the special examiner, who had been appointed for the purpose of taking the examination of witnesses under sect. 115 of the *Companies Act*, 1862, and answer such questions as might properly be put to them, or that such order might be made as to the attendance of any creditors, or their solicitors or agents, and as to their taking notes of the proceedings before the special examiner as to the Court might seem fit.

The witnesses had been summoned by the liquidator to attend before the special examiner, and had attended accompanied by their solicitor, but declined to answer any questions in the presence of Mr. *Lewis*, a solicitor, who claimed to represent certain creditors of the company, and the right to attend in that capacity and also to have the assistance of a shorthand writer to take verbatim notes of the examination, giving as a reason for such refusal

(1) 17 L. T. (N.S.) 488. (2) Law Rep. 4 Eq. 454.

that Mr. *Lewis* was not attending *bonâ fide* for the purposes of the liquidation, but for the purpose of obtaining information for use in proceedings outside the liquidation of the company. Thereupon the examination was adjourned to take the opinion of the Court upon the question.

Ince, Q.C., and *Beddall*, for the motion :—

The 115th section of the *Companies Act*, 1862, gives the Court power to summon before it any person whom it may deem capable of giving information concerning the trade dealings, estate, or effects of the company, but the object of that section is only to obtain information, and it would be very inconvenient if others besides the applicant and the witnesses were allowed to attend.

No doubt it will be said on the other side that rule 60 of the General Orders of November, 1862, gives the creditors a right to attend this examination, but we admit that the term "proceedings" in that rule refers only to proceedings of a contentious character before the Judge himself, and cannot be said to embrace an examination before a special examiner which is of a strictly private character : *In re Western of Canada Oil Lands and Works Company* (1).

Sect. 115 of the *Companies Act*, 1862, is analogous to sect. 120 of the *Bankrupt Law Consolidation Act*, 1849, which was the *Bankruptcy Act* in force when the *Companies Act*, 1862, was passed. The rule in bankruptcy is very strict with regard to examinations, even the solicitor for a witness is not allowed to take his own notes of the examination, and even any notes of points which he may have made cannot be taken away by him without the consent of the other party : The Law and Practice of Bankruptcy (2).

Bramwell Davis, for Messrs. *Harrison & Thompson* :—

We are anxious to give the liquidator all the assistance in our power, and have no objection to attending to be examined, but we do object to the presence of a creditor who may use the information obtained for some ulterior purpose.

(1) 6 Ch. D. 109.

(2) Roche & Haz. 2nd Ed. p. 167.

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Romer, Q.C., and *Greenwood*, for the creditors claiming the right to attend:—

The liquidator is the only person who has a right to object to my being present; the witnesses have no right to raise the objection. There is no analogy between examinations in bankruptcy and examinations under the *Companies Act*, 1862: *In re Merchants' Company* (1). The point now before the Court has, however, been settled: *Empire Assurance Corporation* (2). We have had leave to attend the proceedings, and we submit that under rule 60 of the General Orders of November, 1862, we are entitled to attend this examination.

Ince, in reply:—

The whole object of the 115th section is to assimilate the practice in winding-up to the practice in bankruptcy: *In re Gold Company* (3).

CHITTY, J.:—

This is an application by the official liquidator in substance asking for directions with reference to the conduct of proceedings before a special examiner, who has been appointed for the purpose of taking the examination under the 115th section of the *Companies Act* of 1862, of certain persons whom the liquidator has satisfied the Court already are persons deemed capable of giving information concerning the trade dealings or effects of the company.

The point that arises is of this nature. The witnesses, as I call them, or the persons who have attended, and from whom the information is sought, have attended, but they objected to being examined in the presence of a solicitor who appeared for certain admitted creditors in the winding-up. The gentleman who appeared for the creditors insisted on his right to be there. The witnesses, or persons under examination, insisted that he was not entitled to be there; so that the general question is raised as to the right of a creditor to attend upon an examination of this kind.

(1) Law Rep. 4 Eq. 454. (2) 17 L. T. (N.S.) 488.
(3) 12 Ch. D. 77.

A further point was discussed, which was this, whether, if there is no general right on the part of the creditor to insist on being present, the creditor under the special circumstances of this case (it being in the discretion of the Court) ought not to be allowed to attend.

I have, since the argument was concluded, seen privately, as is right, the official liquidator, and have obtained from him a statement with regard to his views as to the propriety of the creditors attending; and I have also (as a matter of grace and indulgence, not intending to make this a precedent) allowed the solicitor who appeared for the creditors to come before me privately and give me his reasons shewing why he desired to be there. So that I have now the whole case before me: first, the general case, and secondly, the particular question on the special circumstances of the case.

The 115th section of the *Companies Act*, 1862, was undoubtedly inserted by the Legislature in that Act on the same principle as a similar clause in the *Bankruptcy Act* of 1849, and there is in the *Bankruptcy Act* of 1869 a section which is substantially to the same effect as that which was in the older Act of 1849, and in the *Companies Act* of 1862. Now the object of all these sections is to enable the Court to obtain information. I do not say that is the sole object, because other matters are mentioned in the 115th section, but the principal object is to obtain information from any persons capable of giving any information concerning the trade and affairs of the company. The nature of the proceedings is essentially this: the person examined is not examined as a witness, and to talk of examination in chief, or cross-examination, or re-examination in a case of this kind, is to use terms that are really not applicable. What is being done is this: discovery is sought to be obtained which may be useful to the Court in the conduct of the proceedings in the winding-up, and to my mind, looking at the section and the purpose for which the provisions of that section were inserted, an examination of this kind must be considered in the nature of a secret proceeding. It stands, both in bankruptcy and in a winding-up, on a footing which, of course, is not the footing on which cases are conducted which are by way of litigation between parties. The main principle in

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English justice is that all justice shall be administered in public, subject to one or two exceptions, such as the cases of wards of Court.

It has been held that the Examiners' Office is not a public office, and that the public have no right to attend. I have now to consider whether the analogy of the practice in bankruptcy ought or ought not to be followed here. The late Lord *Romilly* is reported to have said in the case of *In re Merchants' Company* (1): "I do not consider that the cases of the practice in bankruptcy have any analogy at all." What I really understand that remark to have meant was, that he was not going to follow what was stated to him to be the practice in bankruptcy, because he decided in that case that the person under examination in justice to himself ought to be allowed professional assistance, and it was represented to him that the practice in bankruptcy was the other way. It turns out from what has taken place before me to be quite clear that the practice in bankruptcy is to allow the person who is under a similar examination proper assistance. I quite agree with Lord *Romilly's* remarks that there would be great danger to an inexperienced man if he should be surrounded by professional skilled men in the room all by himself, and without anybody to render him assistance. There would be a danger of statements being extracted from him, and of things being written down which he did not intend to say, and which might be used against him afterwards by way of admission. The result of the examination—that which is written down—is not evidence against anybody else. It is the statement on oath of the person under examination, but the examination is not a proceeding in the nature of a litigious proceeding between parties, the object of the examination being, as I have already stated, to get information in order to see what course ought to be followed with reference to some matter or some claim which the official liquidator when he applies to the Court is allowed to state privately.

That being so, I think there was an error on the part of Lord *Romilly* when he stated that the practice in bankruptcy had no analogy—of course presuming the report to be correct. I am

(1) Law Rep. 4 Eq. 454, 456.

satisfied that he did not mean to lay down that as a general principle. The late Master of the Rolls (Sir *G. Jessel*), in the case of *In re Gold Company* (1), says (2): "In fact the whole object of the section is to assimilate the practice in winding-up to the practice in bankruptcy, which was established in order to enable assignees, who are now called trustees in bankruptcy, to find out facts before they brought an action, so as to avoid incurring the expense of some hundreds of pounds in bringing an unsuccessful action, when they might, by examining a witness or two, have discovered at a trifling expense that an action could not succeed." I think that Sir *George Jessel* correctly stated in what I have read, that this Court, not being bound of course by the practice in bankruptcy, should follow it so far as it was found to be reasonable.

Now the practice in bankruptcy appears to be this: the party is allowed to have the professional assistance of counsel or solicitor, but the solicitor of the witness is not allowed to take notes of the examination, and even any notes of points which he may have made cannot be taken away by him without the consent of the other party. That is stated to be the rule in a well-known Treatise on Bankruptcy (3), and I believe it to be the practice.

Then it is said that the 60th rule of the General Orders made under the *Companies Act*, 1862, applies, and that any creditor is at liberty to attend at his own instance the proceedings before the Judge, and that this proceeding under the 115th is a proceeding before the Judge. No doubt in a sense it is. When the 115th section is read it is really a proceeding in a sense before the Judge; although the course of practice is not for the Judge, or even the Chief Clerk to sit and take the examination, the business in the offices being so great that the Chief Clerk could not attend to the matter, and therefore (it being a practice which of course requires careful guarding) in proper cases a special examiner is appointed to take it, and the persons from whom the information is sought attend before the Chief Clerk, and the matter is at once adjourned to the special examiner.

But it appears to me that I should be misreading the general

(1) 12 Ch. D. 77. (2) 12 Ch. D. 85.
(3) Roche & Haz. 2nd Ed. p. 167.

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language of the 60th rule if I said that it gave a right to every creditor to attend in this very particular and exceptional proceeding, the intention of which is, as I have said, to obtain information; and it has been part of the practice, and I think rightly, that the official liquidator is not bound to file the evidence. He may do it; but in many cases, for reasons which appear to be sufficient, and which, of course, the Court can judge of if it is ever brought before the Court, it is considered right not to file it, and therefore not to allow any other person to become acquainted with the result of the examination. I think, although there is a technical argument upon the 60th rule, that, upon the true reading of it, this is not such a proceeding as is mentioned there; and a distinction arises to my mind from the very nature of the proceeding under the 115th section. Therefore I hold that the creditors have not a general right to attend.

There is a case before the late Vice-Chancellor Sir *John Stuart* upon which counsel for the creditors endeavoured to found their argument. The case is that of *In re Empire Assurance Corporation* (1).

In that case there were two companies under winding-up before the same Judge, and the affairs of the one company were so mixed up with the affairs of the other that the learned Judge gave the liquidator of the one company leave to attend all the proceedings in the winding-up of the other company. The witnesses were persons being examined under the 115th section, and, a special order having been made, the question arose whether the liquidator who had leave to attend under the special order ought to be allowed to attend on the examination under the 115th section. Sir *John Stuart*, V.C., held that he ought to be allowed to attend. But I cannot help thinking that some portion at least of the language of the learned Judge has been misunderstood. If he is rightly reported, I can only say that I cannot agree with some of the reasoning which appears in the course of his judgment. I am quite satisfied that his order was right, and that there was sufficient special ground in that case to allow the other liquidator to attend; but this is what he said, or is reported to have said, "I consider that the examination before the examiner

(1) 17 L. T. (N.S.) 488.

is a proceeding which the parties objected to have under their orders a right to attend."

Upon that, if I may respectfully say so, I think the Vice-Chancellor is correct, because it was a special order. "But," he says, "they can only be permitted to attend on their undertaking to abide by any order as to costs of their cross-examination which the Court may think fit to make."

If that phrase escaped the Vice-Chancellor I think it was erroneous, because it is not cross-examination under the 115th section, it is merely examination for the purpose of obtaining discovery. Then he says, "There must be a substantial guarantee for these expenses entered into before the Chief Clerk. The examination, however, must be limited to such matters as the Act of 1862 points out, namely, matters concerning 'the trade dealings, estate, or effects of the company.' It will devolve on the examiner to see that the questions asked are strictly confined to the matters arising out of the examination in chief."

There is there, I think, again a slip in the language attributed to the learned Vice-Chancellor. What he meant to do, and what I am satisfied he was entitled and had a right to do, was, to allow the other liquidator to put questions; but in the exercise of his discretion he said that he would not allow those questions to go beyond such as ought to be fairly asked by the other liquidator. That is the way I read his judgment, not that he meant there was to be cross-examination strictly confined to matters arising out of the examination in chief, because it is well known that under cross-examination you may get anything you can from a witness to prove your own case; but that is in a litigious proceeding between two adverse persons, which is not the case here. That is the authority cited in support of the proposition that under the special circumstances of this case the creditors should have leave to attend.

Then I have considered carefully what the official liquidator in this case has communicated to me, and also what the solicitor for the creditors has said with reference to the exercise now of the special discretion which it is admitted the Court has with reference to allowing any person to attend. That such a discretion

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exists as I say has not been contested at the Bar, nor could it be, because the Court does in certain cases where the official liquidator, who is the officer of the Court, and (to use Sir *G. Jessel's* expression) is *dominus litis* (I only use those words in analogy, because here there is no *lis pendens*), allow him to have the conduct of the proceedings, and where he is willing to undertake the examination under the 115th section the Court does not hand over the conduct of those proceedings to the creditor or contributory. But where the official liquidator himself declines to proceed, either from want of funds or for some other reason, the creditor or contributory is allowed in a fit and proper case, and on a proper statement communicated to the Judge, to take proceedings. So that I am quite satisfied the Court has discretion to allow a creditor or a contributory to attend even this secret tribunal.

But I, as I have said, having seen the official liquidator and the solicitor for the creditors, have come to the conclusion that it is not expedient in this case that the creditors should be allowed to attend. Of course I necessarily do not give my reasons, because, if I did, that would be disclosing matters which I am satisfied in the present state of this investigation ought not to be disclosed.

It must not be for a moment supposed that when litigation arises, if it ever should, and any attempt is made to make use of the examination, the whole matter will not be then dealt with in public; and all parties who are concerned in any summons in the winding-up, or the like, against whom the examination is sought to be made use of, so far as it can, will then be at liberty to examine and cross-examine in any way they may think fit. The examination is, as I have said, for information; and I am not even prepared to say that the examination of the witness can on notice be read as against any party concerned in any subsequent litigation that occurs in the winding-up. Certainly it could not be used in any proceeding which is not in the winding-up, nor used in bankruptcy. It is not necessary to decide it, but I make these observations to shew that no injustice can be done by the exercise of the powers which have been called powers under a clause called the "*Star Chamber*" clause.

These powers can never be so used as to work injustice to anybody.

The costs of the motion will be paid out of the assets of the company.

Solicitors: *Croft; Snell, Son, & Greenip; A. Calkin Lewis.*

G. M.

BULMER *v.* BULMER.

[1881 B. 6656.]

Railway Accident — Compensation — Compromise—No Action brought—Lord Campbell's Act (9 & 10 *Vict. c.* 93) [*Revised Ed. Statutes, vol. ix. p.* 1306]—*Amendment Act* (27 & 28 *Vict. c.* 95) [*Revised Ed. Statutes, vol. xiv. p.* 935] —*Distribution of the Fund.*

A sum of money was received from a railway company by way of compensation by the executors of a person whose death had resulted from injuries received in an accident on the railway, no action having been brought under *Lord Campbell's Act* (9 & 10 Vict. c. 93).

The executors brought an action in the Chancery Division, to which all the relatives of the deceased referred to in sect. 2 of 9 & 10 Vict. c. 93, were parties, asking for a declaration as to the persons entitled to the money:—

Held, that the Court could distribute the fund amongst such of the relatives of the deceased as suffered damage by reason of the death, in the same manner as a jury could have done in an action under the Act.

JOHN BULMER, by his will, dated the 31st of May, 1872, after bequeathing legacies of his household furniture and life policies of £1000 to his wife the Plaintiff, *Sarah Elizabeth Bulmer*, and certain other pecuniary legacies, declared that the residue of his estate was to be held upon trust for his wife for life or widowhood, with remainder to such of his children by his second marriage as should attain the age of twenty-one years, or (being females) marry under that age, and he appointed his wife guardian of his infant children by his second marriage, and appointed her and the co-Plaintiff *Joseph Newton*, executrix and executor of his will.

The testator died on the 17th of April, 1874, his death having been accelerated by an accident on the *Great Western Railway*, by which he was injured. The Plaintiffs made a claim against

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the company for damages pursuant to the Act 9 & 10 Vict. c. 93, and after some negotiation, the company, late in the year 1874, paid to the Plaintiffs the sum of £2026 5*s.* in discharge of the claim. No action was brought against the company in respect of the claim, and consequently no apportionment of the £2026 5*s.* by a jury, under the Act, was ever made.

The testator was twice married. By the Plaintiff, his widow, he had six children, all of whom at the date of the issue of the writ were infants, and were at the testator's death living with him and maintained by and wholly dependent upon him.

By his first marriage the testator had seven children, namely, the Defendants *R. B. Bulmer*, *E. S. Bulmer*, *George Bulmer*, *Charles Bulmer*, *Edith Alice Browne* (who had at the testator's death five children), *Mary Jane Ross* and *Harriett Vickers*, both of whom predeceased the testator leaving children: *George Bulmer*, who was an undischarged bankrupt, had at the testator's death two children. The testator left no father or mother, grandfather, or grandmother, and no stepchild surviving him. None of the children by his first marriage nor any of their children were living with or maintained by the testator at the time of his death, nor dependent upon him, except that he was still giving some assistance to *George Bulmer* and *Charles Bulmer*.

The Plaintiffs as personal representatives of the testator paid out of the sum of £2026 5*s.* the costs of the negotiations with the railway company, and invested the balance, amounting to £1973 15*s.*, upon mortgage, and paid the income to the testator's widow as if the same belonged to the testator's estate, and she applied it in the maintenance and education of her infant children.

The Plaintiffs, however, being advised that the same did not form part of the testator's estate, and being desirous for the opinion and decision of the Court as to the persons entitled thereto and the shares in which they were so entitled, and as to how the same and the income thereof ought to be and to have been applied, commenced this action, to which all the children of the testator, the children of deceased children, and the trustee in bankruptcy, and the children of *George Bulmer*, were made Defendants, claiming a declaration in the above terms.

Waller, Q.C., and *Bunting*, for the Plaintiffs.

Samuel Dickinson, for *Edith Alice Browne* and her infant children :—

The Court must divide the fund equally *per capita* among the members of the classes specified in the 2nd section of the Act as those for whose benefit the action is to be brought. The Court cannot exercise the power given to "the jury" of apportioning the fund among the members of these classes. The case is similar to those where a fund is given by deed or will to specified persons with a power of appointment among them by a person who dies without appointing, in which case it is divided equally: *In re Adam's Policy Trusts* (1). He also referred to *Sanderson* v. *Sanderson* (before Vice-Chancellor *Malins*, June 8th, 1877).

E. Cutler, for the trustee in bankruptcy of *George Bulmer*, contended that he was entitled to a share in the fund for the benefit of the creditors.

T. L. Wilkinson, for *Charles Bulmer*.

H. Warlters Horne, for the children of *George Bulmer*.

L. L. Shadwell, *E. B. Calvert*, *Casserley*, and *T. M. M. Wilde*, for other parties.

CHITTY, J. :—

In this case the executors of a deceased person have, without bringing an action under *Lord Campbell's Act* (9 & 10 Vict. c. 93), intituled "An Act for compensating the Families of Persons killed by Accident," compromised with the railway company the demand which they might have made under that Act, for the sum of £2026, and after deducting the costs of the compromise they have a sum in their hands, which they now ask the Court how they are to distribute.

The only machinery provided by *Lord Campbell's Act* and the amending Act (27 & 28 Vict. c. 95), which two Acts constitute

(1) 23 Ch. D. 525.

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the whole legislation on the subject, is by means of an apportionment by the verdict of a jury.

An action under these statutes may be brought on behalf of what may be shortly called, using the title of the Act, the "family" of the person killed by accident; but the word "family," taking the enactments together, means, in a case like the present, the wife, children, and grandchildren of the deceased person. The 2nd section of the Act 9 & 10 Vict. c. 93, is as follows: "And be it enacted that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct."

The amending Act (27 & 28 Vict. c. 95) made a slight difference rather in form than in substance, allowing the parties themselves to sue in certain cases instead of the action being brought by the executors.

When the questions are before the jury, undoubtedly the right way for the jury to proceed is either to take the individual claims of the persons on whose behalf the action is brought and to adjudicate on them separately, or to fix on an aggregate sum, and then to divide such sum among the persons entitled. Both of these methods are adopted by juries.

The Acts of Parliament not having provided any mode of apportionment other than by the verdict of a jury, the first question I have to determine is whether I can apportion the fund. I am clearly of opinion that I have jurisdiction to do so under the general jurisdiction of the Court, and that I can exercise it, as all the persons on whose behalf the action might have been brought are before the Court.

The apportionment, however, must be made on the same principle as it would have been if the matter had been before a jury,

and they would require to be satisfied that injury had in fact resulted to the persons claiming damages. In this case the principle of distribution must not be one of equal division, but in proportion to the damage sustained by reason of the death.

His Lordship then, after going through the evidence, proceeded to apportion the fund, and after directing payment of the costs and giving the sum of £52 10*s.* to each of the two children of *George Bulmer*, the bankrupt, and the sum of £10 10*s.* to *Charles Bulmer*, divided the residue into eight equal parts, giving two-eighths to the widow and one-eighth part to each of the six children of the second marriage.

Solicitors: *Newbon, Harrison, & Co.; Reep, Lane, & Co.; Lidiard & Co.; Aldridge.*

G. M.

WESTHEAD *v.* RILEY.

[1881 W. 3898.]

Practice—Equitable Execution—Receiver—Debts and Sums of Money—Judgment Debtor—Judgment Creditor—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Rules of Supreme Court* 1883, *Order* L., *r.* 6.

Since the *Judicature Acts* the Court can grant equitable execution by the appointment of a receiver at the instance of a judgment creditor against debts and sums of money payable to the judgment debtor to which garnishee proceedings are not applicable.

ON the 4th of November, 1882, the Plaintiff obtained an order against the Defendant *Riley* for payment to him of a sum of £700 and upwards. The Plaintiff had endeavoured to enforce this judgment by writ of *fieri facias*, which was ineffectual by reason of the Defendant's goods being covered by a bill of sale. The Plaintiff had recovered a small part of his demand by garnishee orders.

In October, 1883, the Plaintiff ascertained that under an order in an administration action in the Chancery Court of the County Palatine of *Lancaster* certain costs were directed to be paid to the Defendant *Riley* (who was a solicitor) out of a fund standing

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in the Palatine Court. As soon as the costs in question had been taxed, and the bill vouched, the Plaintiff obtained an *ex parte* injunction in this action against the Defendant restraining him from receiving the amount of the taxed costs in the Palatine suit, and now moved on notice for a declaration that the taxed costs payable to the Defendant might stand charged with the payment to the applicant of the Defendant's debt, and for a receiver, and that the receiver might be at liberty to make such application to the Palatine Court as he might be advised for raising the charge, that the interim injunction might be continued, and that the Defendant might pay the costs of the application.

Decimus Sturges, for the motion:—

I ask for equitable execution against this sum of money due to the Defendant on the principle discussed in *Anglo-Italian Bank* v. *Davies* (1). It is not necessary to commence any separate proceeding for this purpose: *Smith* v. *Cowell* (2). The principle of equitable execution applies to other property than equitable interests in land: *Bryant* v. *Bull* (3), and is the general right of a judgment creditor.

Horace J. Browne, for the Defendant:—

The Court has no jurisdiction to interfere with the fund standing in the Palatine Court. The principle of equitable execution applies only to land. *Bryant* v. *Bull* was exceptional, as being the case of a married woman.

Chadwyck Healey (*amicus Cur.*), referred to *Fuggle* v. *Bland* (4).

CHITTY, J:—

I think upon the authority of the case to which Mr. *Chadwyck Healey* has referred me I have jurisdiction to appoint a receiver in this case. I am also of opinion that this case falls within the general principles laid down by the Court of Appeal in *Anglo-Italian Bank* v. *Davies*, and is also within sect. 25, sub-sect. 8 of the *Judicature Act*, 1873. As there is no way of getting this

(1) 9 Ch. D. 275.
(2) 6 Q. B. D. 75.
(3) 10 Ch. D. 153.
(4) 11 Q. B. D. 711.

fund except by the appointment of a receiver, which operates as equitable execution, I shall therefore appoint a receiver as asked, but shall make no declaration of charge. In other respects the order will follow the terms of the notice of motion.

Solicitors: *Hamlin, Grammer & Hamlin*, agents for *Brighouse, Brighouse, & Jones, Ormskirk ; Owles & Collinson.*

G. M.

In re MERCANTILE MUTUAL MARINE INSURANCE ASSOCIATION.

Company—Liquidation of Member—Winding-up of Company after and pending the Liquidation—Order of Discharge—Subsequent Call—Contributory—Provable Debt or Liability—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 75, 77 [*Revised Ed. Statutes, vol. xiv., pp.* 219, 220]—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.

The liability in respect of calls of a liquidating member of a company where the liquidation proceedings commence prior to the winding-up of the company, and are pending at the time of the winding-up, is a debt or liability which is not "incapable of being fairly estimated," and which is therefore provable in the liquidation. When, therefore, under those circumstances, a company winding up has failed to carry in a proof in the liquidation proceedings of a member of the company for calls, and the liquidating member obtains his discharge, he cannot afterwards be placed on the list of contributories.

Furdoonjee's Case (1) discussed and not followed.

THIS was a motion on behalf of one *David Jenkins*, that his name might be removed from the list of contributories of the *Mercantile Mutual Marine Insurance Association.*

The association was a company limited by guarantee, and the objects for which it was established were the mutual insurance by the association (1), of the ships of the members, and of ships which the members might be authorized to insure in their own names, and of ships in which they might be interested; (2), of the freights of ships; and (3), of all other interests or measures usually or properly covered by or included in insurances with respect to shipping and to interests therein.

(1) 3 Ch. D. 264.

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The 5th clause of the memorandum of association was as follows:—

"Every member of the association undertakes to contribute to the assets of the association in the event of the same being wound up during the time that he is a member, or within one year afterwards, for the payment of the debts and liabilities of the association contracted before the time at which he ceases to be a member, and the costs, charges, and expenses of winding-up the same, and for the adjustment of the rights of the contributories among themselves, such amount as may be required not exceeding five pounds."

Jenkins in the early part of the year 1880, became a member of the association in respect of classes 1 and 2 for ships and freight pursuant to the rules of such classes respectively in respect of the ships and freights named in the policies to which he became entitled.

The rules in respect of class 1 for ships provided for the payment of calls and for an undertaking to be given by the members for the payment of all calls and for accepting all liabilities in respect of ships insured in the association.

On the 15th of July, 1880, *Jenkins* filed his petition under the *Bankruptcy Act*, 1869.

On the 5th of August, 1880, the first meeting of creditors was held, and at such meeting resolutions were passed that *Jenkins*' affairs should be liquidated by arrangement.

On the 31st of January, 1881, a resolution was passed that the liquidation proceedings should be deemed to be closed as from the 28th of February, then next, that he should have his discharge, and that his trustee should be released.

At the date of his liquidation *Jenkins* was in arrear for a call made by the trustees of the association on the 1st of July, 1880, and in the course of the liquidation proceedings the manager of the association proved against the estate for the sum of £196 3*s.* 1*d.*, being the amount claimed in respect of calls up to that date, and the proof was admitted.

On the 16th of December, 1880, the association passed a resolution to wind up voluntarily.

On the 12th of February, 1881, a supervision order was made.

On the 7th of April, 1882, *Jenkins* was settled on the list of contributories for the sum of £343 3*s.* 5*d.*, being for calls in respect of liabilities accrued after the 1st of July, 1880, and which sum did not include the above-mentioned sum of £196 3*s.* 1*d.*

On the 1st of May, 1882, the first call was made by the liquidator, but certain of the contributories setting up the 5th clause of the memorandum above set out, and claiming the same as a limit of their liability to £5, a special case was agreed upon which was heard before Mr. Justice *Chitty* on the 24th of July, 1883, when he decided that the liability was not limited to that sum there being, in his opinion, a further contract in the rules and regulations of the association before mentioned by which the insurers rendered themselves liable to losses.

Thereupon the liquidator issued summonses to compel payment of the call, returnable on the 5th of December, 1883, but pending that summons *Jenkins* served the present notice of motion. It appeared that so far as *Jenkins* was concerned, and in fact as regarded all the other members of the association, all the ships had run off risk on or before the 1st of December, 1880, while the liquidation proceedings were still pending.

Ince, Q.C., and *Badcock*, in support of the motion:—

When the winding-up of this association commenced the liquidation proceedings were going on, and the question is whether the call made by the liquidator was one which was capable of proof; if it was then this motion must succeed.

Under the law as it stood before the *Bankruptcy Act*, 1869, if a contributory were adjudicated bankrupt before the winding-up calls made in the winding-up could not be proved at all, but since that Act was passed under the 31st section of that Act, using the words of Lord Justice *Lindley* in his work on the Law of Partnership (1), "when a shareholder becomes bankrupt, all calls in arrear are provable as debts, and his liability to future calls may be estimated and proved as well when the company is being wound up as when it is not. If the shares are neither disclaimed nor sold by the trustee, but are allowed to remain in

(1) 4th Ed. p. 1180.

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the name of the bankrupt, and he obtains his discharge, it seems that he will nevertheless be freed from calls in respect of them, as his liability to them was capable of proof."

Mr. *Buckley*, in his work on the *The Companies Act*, 1862 (1), however, ventures to submit whether the proposition as above laid down by Lord Justice *Lindley*, is consistent with *Furdoonjee's Case* (2), where, no doubt, Vice-Chancellor *Bacon* held that a liability in respect of calls in a winding-up was not a debt provable in bankruptcy. But we submit that in that case the question turned on the effect of the *Indian Insolvency Act*, and so the Lord Justice *Lindley* treats it, and, as we venture to submit, rightly. The calls in this case were, we submit, easily capable of being estimated and proved. In *Ex parte Neal* (3), which was the case of an annuity payable to a wife *dum casta*, the Court of Appeal held that the value of the annuity was capable of being fairly estimated, and was provable in the liquidation of the husband.

Furdoonjee's Case is the only case to be found on the point, and we submit that the decision there turned on the *Indian Insolvency Act*, and is, therefore, no authority.

Romer, Q.C., and *H. B. Buckley*, for the liquidator:—

We submit that the liquidator could not have proved in this case for the calls. The value of the debt or liability of the contributory was one which was, to use the words of the 31st section of the *Bankruptcy Act*, 1869, "incapable of being fairly estimated."

Furdoonjee's Case is, we submit, a direct authority on the point. Laying aside the question of the *Indian Insolvency Act*, Vice-Chancellor *Bacon* was clearly of opinion that a fair estimate could not have been put upon the amount of the liability, for he says, both during the argument and in his judgment: "I do not see how the liability could have been a provable debt."

We submit that the liquidator was right in putting *Jenkins* on the list of contributories, and that this motion ought to be refused with costs.

(1) 4th Ed. p. 179. (2) 3 Ch. D. 264.
(3) 14 Ch. D. 579.

CHITTY, J.:—

This is a motion by Mr. *Jenkins*, asking to have his name struck off the list of contributories. The facts, so far as they are material, are shortly these. Mr. *Jenkins* was a member of the company which is now in course of winding up, and which was a *Mutual Marine Insurance Association*, and he was liable to contribute in the winding-up certain amounts which he had guaranteed, and also according to a decision which I pronounced in the course of this same winding-up in July last, and according to a decision, I believe, of the Court of Appeal, in another case, he was liable to contribute further sums in respect of the contract which he entered into contained in the rules and regulations of the company. *Jenkins*, on the 15th of July, 1880, presented his petition in bankruptcy, and on the 5th of August, 1880, a resolution for liquidation by arrangement was passed, and on the 31st of January, 1881, a resolution was passed which was also a valid one, that the proceedings should be deemed to be closed as from the 28th of February then next, and *Jenkins* was granted his discharge and his trustee released. It was admitted in the argument before me that there is, for the purpose of the question I have to decide, no distinction between liquidation by arrangement and bankruptcy.

The facts as regards the company are these. On the 16th of December, 1880, the company passed a resolution for voluntary winding-up, and on the 12th of February, 1881, a supervision order was made. The company, on the 5th of August, 1880, had carried in a claim in the liquidation proceedings for calls due from *Jenkins* up to that time, and this claim was admitted; but they did not seek to prove for the liability that *Jenkins* was under in respect of any further contributions he might be liable to make.

From what I have stated, it is clear that the liquidation proceedings were current during part of the time after the voluntary winding-up commenced. So that the case falls within the 75th section of *The Companies Act*, 1862, and there is no difficulty on the point whether or not *Jenkins* was "a contributory" during the liquidation proceedings. The point is this, whether *Jenkins'* liability was one which was capable of being estimated or not.

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The 31st section of the *Bankruptcy Act* of 1869 contains an explanation of the term "liability," shewing that it includes, for the purposes of the Act, "any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur, or capable of occurring, before the close of the bankruptcy, and generally, it shall include any express or implied engagement, agreement, or undertaking to pay or capable of resulting in the payment of money or money's worth, whether such payment be as respects amount fixed or unliquidated; as respects time present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." There is in the earlier part of the section an enactment to this effect: "Any person aggrieved by any estimate made by the trustee as aforesaid, may appeal to the Court, and the Court may if it think the value of the debt or liability incapable of being fairly estimated, make an order to that effect."

Now, apart from any authority on the matter, I should have said that there would be practically but little difficulty in any case where there is a winding-up going on in putting an estimate on the liability of any contributory; it is constantly done by the liquidator when he proposes under a winding-up under the Court that a call should be made. He comes to the Court and states that in his opinion such and such a sum is required, and he asks for liberty to make a call accordingly. It is almost a constant practice that an estimate should be put in the way I have mentioned on the liability, because of course in order to shew what sums the liquidator requires, he takes into consideration all the circumstances of the case, and his estimate is the estimate of the aggregate liability of all the contributories. I should have thought, apart from any decision on the matter, that it was a perfectly practicable thing to make an estimate in a case of this kind. In the case before me there is this peculiar circumstance, that all the risks had run off so far as *Jenkins* was concerned, and indeed as regards all the other contributories, by the 1st of

December, 1880; but no doubt some further time might be required after that date to enable the liquidator to ascertain whether the losses had or had not occurred within the period. There is no evidence before me to shew that any great length of time did elapse before he had notice of the losses, and I understand the last loss in respect of which *Jenkins* would have, according to the liquidator's statement, to contribute, is a loss which occurred sometime in the month of December, 1880, before the liquidation proceedings closed. In the absence of proof to the contrary, I hold that there would not have been the slightest difficulty in this case in ascertaining the amount of the liability and putting a just estimate upon it. If there should have been one ship (it is not shewn to me there was) the fate of which had not been ascertained, still that would not have presented any insuperable difficulty in making the estimate. That is how I regard the matter apart from authority.

But it was said that Vice-Chancellor *Bacon* has decided the contrary in *Furdoonjee's Case* (1). No doubt that case was one which related to an Indian insolvency, and the case has been treated by some of the text-writers of great learning and authority as turning on that fact, and I am very much disposed to take that view of the case, and to think that was all that was intended to be decided by Vice-Chancellor *Bacon*, who had not before him a section similar to the one I have to deal with, namely, the 31st section of the *Bankruptcy Act*, 1869. But there are some observations, no doubt, of the Vice-Chancellor upon which an argument has been founded that in his opinion a fair estimate could not have been put on the amount of the liability. Speaking with the greatest respect for the Vice-Chancellor, if that was his opinion, it appears to me it would not be reconcilable with the decisions of the Court of Appeal, who have dealt with cases of far greater difficulty than the one which he had before him. I repeat I attribute the decision to the *Indian Insolvency Act*, and it is only some expressions which have fallen from the Vice-Chancellor which have led to the argument. If his opinion was such as I have mentioned, then I think it would be inconsistent with the decisions of the Court of Appeal, who, as I before

(1) 3 Ch. D. 264.

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observed, have dealt with matters of far greater difficulty. One case is sufficient to mention, and that is *Ex parte Neal* (1) where the Court of Appeal put an estimate on an annuity which was agreed to be paid to a woman *dum casta*. That was a matter which practical men after all could deal with, although exactly what deduction ought to be made in respect of the condition did cause some difficulty. But to the Court of Appeal that did not appear to raise any insuperable difficulty.

I am quite clear in this case what my judgment ought to be. It ought to be in favour of Mr. *Jenkins*. I found my judgment not merely on the particular facts of this case, but also on the broader principle, and I think the liability to pay calls where the company is in winding-up, is a debt or liability which is not, to use the words of the 31st section, "incapable of being fairly estimated."

Solicitors: *Crowder, Anstie, & Vizard; Lowless & Co.*

(1) 14 Ch. D. 579.

G. M.

TRUMAN *v.* LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

NORTH, J.

1883

July 2, 3, 4, 5; *Dec.* 17.

[1882 T. 1328.]

Railway Company—Powers—Nuisance.

A railway company were by their Act empowered to purchase (besides the lands as to which they had compulsory powers) any lands not exceeding in the whole fifty acres for the purpose of making additional station yards for cattle and for other purposes, and were also empowered to carry cattle (amongst other things). The company accordingly purchased a piece of land adjoining one of their stations, and used it for unloading cattle. The noise of the cattle and drovers was a nuisance to the occupiers of certain houses near the station; and they brought an action to restrain the company accordingly:—

Held, that as the company were not obliged by their Acts to carry cattle or to have a station for cattle, and had not shewn that this was the only available place for such a station, they had no power to create a nuisance at this place; and an injunction was granted with damages.

Hammersmith Railway Company v. *Brand* (1) distinguished, and *Managers of Metropolitan Asylum District* v. *Hill* (2) discussed.

By the Act 1 & 2 Vict. c. cxix. the *London and Brighton Railway Company* was incorporated and empowered to make a railway from the *London and Croydon Railway* to *Brighton*, with the usual compulsory powers of taking land within the limits of deviation. By the 82nd section the company was empowered to contract with any person or corporation (who should be willing to sell the same) for the purchase of any lands not exceeding in the whole fifty statute acres in addition to the lands thereby authorized to be taken, in such places as should be deemed eligible, for the purpose of making and providing additional station yards, wharfs, waiting, loading and unloading places, warehouses, and other buildings and conveniences for receiving, depositing, loading, or keeping any cattle or any goods, articles, matters, or things conveyed or intended to be conveyed upon the said railway, and for making convenient roads or ways thereto, or for any other purposes whatsoever connected with the undertaking which the said company should judge requisite. By the 198th section the

(1) Law Rep. 4 H. L. 171. (2) 6 App. Cas. 193.

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company was authorized to use locomotive engines, and to convey all such passengers, cattle, and other animals, goods, and things as should be offered to them for that purpose.

The *London, Brighton, and South Coast Railway Company*, with which the *London and Brighton Railway Company* was by a subsequent Act incorporated, had under the 82nd section bought a piece of land adjoining their *East Croydon Railway Station*, and had made it into a yard or dock for cattle brought by the railway.

This action was brought on behalf of the owners and occupiers of eight dwelling-houses in *Lansdowne Road*, near the *East Croydon Station*, to restrain the *London, Brighton, and South Coast Railway Company* from bringing cattle, sheep, and other animals into the yard of their *East Croydon Station*, and keeping them there so as to be a nuisance to the owners and occupiers of the houses in *Lansdowne Road*. The principal defence was that the railway company were by their Acts empowered to carry cattle and to buy land for stations, and for receiving and keeping cattle and other things, and that they had done everything in their power to prevent the cattle and other animals from being a nuisance or annoyance.

Witnesses were produced on both sides as to the extent and nature of the annoyance and the alleged negligence of the company, and the possibility of finding another site. The facts and the result of the evidence are fully stated in the judgment delivered by the Court.

Higgins, Q.C., *Barber*, Q.C., and *A. Young*, for the Plaintiffs:—

A market is a nuisance *per se*, and besides, the company keep the cattle too long in the trucks: *Walker* v. *Brewster* (1); *Rex* v. *Moore* (2); *Inchbald* v. *Robinson* (3). The tenants have left, and the houses are not habitable in consequence of the annoyance. No doubt the company have a statutory power to land cattle at their stations, but that is only between them and their shareholders, and they are under no obligation to do so, and are as liable for nuisance as any one else. If the Legislature had intended to authorize a nuisance it would, as in other cases, have provided

(1) Law Rep. 5 Eq. 25. (2) 3 B. & Ad. 184.
(3) Law Rep. 4 Ch. 388.

for compensation: *Managers of Metropolitan Asylum District* v. *Hill* (1); *Clowes* v. *Staffordshire Potteries Waterworks Company* (2); *Attorney-General* v. *Gas Light and Coke Company* (3); *Geddis* v. *Proprietors of Bann Reservoir* (4).

Rigby, Q.C., and *Ingle Joyce*, for the railway company:—

The company was empowered to carry cattle, and as carriers must take them, and they have not been guilty of negligence in doing it or in the selection of a site: *Hammersmith Railway Company* v. *Brand* (5). A railway company has the same right to carry and land cattle as to use locomotives, and is not liable for the necessary annoyance: *Rex* v. *Pease* (6).

Barber, in reply:—

There are two questions, first, whether the company have a right to make a cattle yard, and secondly, whether they have a right to commit a nuisance. No doubt, under the *Railways Clauses Act* (8 & 9 Vict. c. 20), s. 16, the company may construct stations and do many things making compensation, but nothing is said about carrying cattle, which comes under sect. 45, where nothing is said about compensation. The company have power, but are not obliged to carry cattle, and if they choose for their own profit to do so, they must not in so doing commit a nuisance. *Hammersmith Railway Company* v. *Brand* was decided on the ground that the company were merely doing the very things for which they existed. At all events this company were not obliged to put their cattle-market in this particular place.

Dec. 17. NORTH, J.:—

By an Act passed in the year 1837 the *London and Brighton Railway Company* was incorporated, and was empowered to make and maintain a railway which was shortly afterwards constructed, and of which the Defendants' line, and the principal portion of their station at *East Croydon*, form part. In the year 1846, the Defendant company was incorporated by the amalgamation of

(1) 6 App. Cas. 193.
(2) Law Rep. 8 Ch. 125.
(3) 7 Ch. D. 217.
(4) 3 App. Cas. 430.
(5) Law Rep. 4 H. L. 171.
(6) 4 B. & Ad. 30.

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the old *London and Brighton Railway Company* with several other companies, and the old company was dissolved, but all its lines, works, and powers were transferred to and vested in the Defendant company.

When the line was first constructed, and for many years afterwards, the only mode of access to the *East Croydon* Station was on its south side from a street called *George Street*, and all cattle (I use that word to describe all live stock carried by the railway) were taken to and from the station by that route. There was no direct communication between the station and *Lansdowne Road*, which lies to the west of the line.

In the year 1851 the Defendant company purchased a piece of land, between two-and-a-half and three acres, lying to the west of their line between the station and *Lansdowne Road*. The purchase was doubtless made rather with a view to future requirements than for the present purposes of the company, as for many years the land so acquired, or a portion of it, was used as gardens for the servants of the company.

The company are authorized by their Acts to be, and have from the first been, carriers of cattle. To give facilities for the receiving and loading and unloading thereof, certain structures called cattle-banks, or cattle-docks, and pens are found necessary, and in the early days of the railway these structures were erected on each side of the line very near to the general passenger station. These were found inconvenient, and about the year 1862 they were done away with, and a new cattle-bank was erected on the west side of but near the back of the same station. That also became inconvenient as traffic increased, and ten or twelve years ago it was taken away, and another cattle-bank (called in the statement of defence the old cattle-bank) was erected further to the west, and much nearer to the *Lansdowne Road*.

In the year 1881 a new state of things arose. The town and neighbourhood of *Croydon* had increased enormously. It was the only place in the district where a cattle-market was held, and the cattle trade had been very quickly and greatly developed. The accommodation at the old cattle-bank had become wholly insufficient. It was incapable of extension on that site: the site, too, had become dangerous by reason of the extension of the goods

yard and sidings in its immediate neighbourhood, and the increased difficulty of getting cattle from the cattle-bank to the public road across the obstructions, and by the route used also for carriages and for foot-passengers. In addition to this the requirements of the Privy Council with respect to the moving of cattle made further accommodation indispensable, and rendered a larger space for the purpose of this traffic imperatively necessary. To meet these requirements the company, in the year 1881, devoted the piece of land I have mentioned to the purposes of their cattle traffic, and upon it they placed five or six new lines of railway sidings, and beyond this, abutting on *Lansdowne Road*, they constructed, what are called in the pleadings, a cattle-dock, or yard and cattle-pens, with an opening therefrom into *Lansdowne Road*, through which all the cattle traffic has been carried since these new arrangements were completed. I may add that this was all done by the company in consultation with and with the full concurrence of the local authority and of the Privy Council.

The Plaintiffs allege that these new works by the company are a nuisance, and seek to have them restrained by injunction.

The Plaintiff, *Charles Potter*, is the owner in fee and occupier of a house called *Charlesworth*, in the *Lansdowne Road*, erected by him about ten years ago. [His Lordship then described the property, the cattle-dock and pens being visible from the dining-room windows, and the distances from his house and gate respectively to the nearest part of the cattle-dock being 80 and 40 feet, whilst the distance from his house to the nearest part of the old cattle-bank was 260 feet. His Lordship then stated the facts as to the ownership, occupation, and position of the houses of the other Plaintiffs.]

The Plaintiffs, by their statement of claim, allege that the use by the company of the cattle-dock and pens in question for the purposes of the cattle traffic, causes them, to put it shortly, an intolerable nuisance, first, by reason of the noise made by the animals and attendant drovers in the process of loading and unloading into and from the trains; secondly, by the noise of the animals while kept in the trucks before they are unloaded, which frequently lasts for many hours; and a third ground of complaint made at the bar (though not found in the pleadings) and

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prominently put forward by witnesses, was that the driving of the frightened and irritated animals out, into, and along *Lansdowne Road,* and the dirt necessarily caused thereby, with the shouting and swearing of the drovers, render that previously quiet road almost impassable by women and children, and is itself a nuisance entirely altering the character of the neighbourhood and depreciating the value of the property.

This last cause of complaint may be at once dismissed. That a considerable amount of discomfort has been thus caused to the inhabitants I do not doubt, but that cannot be helped. The company were quite within their rights when they made an opening in their own fence and allowed the cattle to be driven through it from their own land within the fence upon the highway without. Even if the driving along the road had been done by the company's own servants it would not have given any legal grounds of complaint. Persons living in houses looking upon a highway must accept the advantage of having the highway there in return for the convenience or inconvenience which may attend upon its existence. The ordinary use of a highway is not a nuisance to such an extent or in such a way as to be actionable: *per* Lord *Bramwell, Hammersmith Railway Company* v. *Brand* (1). And the driving of cattle along a highway is an ordinary use of it. Lord *Blackburn,* in the same case (2), puts the exact case when he speaks of "the hardship which, for the public good, is imposed by the common law on the owner of a quiet villa if his neighbour dedicates the land close under his windows to the public as a highway; it may be leading to *Smithfield Market,*" as a thing which has to be put up with. In the present case the road existed before the houses.

With respect to the alleged nuisance from the noise of the animals before being unloaded and in the course of unloading and loading, the Plaintiffs have, in my opinion, made out a case which the company have to meet. The Plaintiffs have given me much difficulty upon this point by the generality and vagueness of their evidence, the chief part of which has reference to the use of *Lansdowne Road,* which, as I have just pointed out, does not give a legal ground of action. But, upon the evidence, I

(1) Law Rep. 4 H. L. 171, 192. (2) Law Rep. 4 H. L. 198.

have come to the conclusion that there is sufficient noise of cattle on the premises of the company to cause serious annoyance and disturbance to the Plaintiffs, and materially to interfere with the ordinary use and enjoyment of their houses and the comfort of the inhabitants, and that there has been a very great and serious increase in such discomfort since the new cattle-dock was made. [His Lordship then referred shortly to the evidence, and said that he did not think that the company seriously contested the question whether there was actually material discomfort to the Plaintiffs. His Lordship then proceeded:—] I come, therefore, to the conclusion that there is what would, if the Defendants were private individuals without statutory powers, clearly be an actionable nuisance. The real defence of the company is a justification, which I now proceed to consider.

The company say that they have a statutory power to erect these conveniences for cattle where they have been erected; that if so they cannot be liable to the Plaintiffs unless in the exercise of such statutory power they have been guilty of negligence, and that they have not been guilty of negligence. The law upon this point is quite settled. In *Geddis* v. *Proprietors of Bann Reservoir* (1) Lord *Blackburn* says: "I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature has authorized, if it be done negligently. And I think that if, by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." If, therefore, the company can bring themselves within the protection of these propositions, the action must fail.

To deal with the question of negligence first. The only negligence complained of in the pleadings is in not erecting the cattle-dock and pens in a suitable place for such traffic, and in negligently erecting them in a place where they must inevitably damage the Plaintiffs' property, or, in other words, negligence in

(1) 3 App. Cas. 430, 455.

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the selection of a site for the traffic. I put this aside for the present, to be considered in connection with and as part of the question what the statutory powers of the company are. It was also alleged at the bar that there was further negligence on the part of the company in the manner in which they conduct the traffic on that site—(1) in not preventing the noise made in loading and unloading, and (2) in allowing the animals to remain too long in the trucks near the houses, so as to prolong unnecessarily the period during which the noise prevails. Upon these points the Plaintiffs fail, in my opinion, to make out their case, independently of the fact that the point is not raised by their pleadings. One of the Plaintiffs, *Potter*, an experienced witness, having been himself a butcher, says, as is indeed obvious, "with all the regulations you can make, you cannot prevent the things being a nuisance to the neighbourhood." And, with respect to the suggestion that the cattle are allowed to remain too long at the station, the evidence satisfies me that the Defendants have done all they can to prevent this. The delay arises from the fact that some of the owners of the cattle will not fetch them except at such times as are convenient to themselves, and in consequence some of the cattle are frequently left at the station all night, and some lowing and bleating is the inevitable result. The company have for many years held themselves out as common carriers of cattle, and they cannot refuse to carry one man's or another man's cattle because the owner is dilatory in sending for them. The evidence satisfies me that the company do all in their power by giving notice to the owners to get the cattle removed as soon as possible, and by placing the trucks as far from the houses as they can to minimise the annoyance to the Plaintiffs. These charges of negligence therefore fail. Now the statutory powers under which the company profess to be acting are found in the Act of 1837, to which I have already referred. That Act gave the railway company power to take compulsorily the lands described in the deposited plans and sections, similar to the general powers subsequently conferred by the *Lands Clauses Consolidation Act*, and it was under this power that the main line and the principal part of the station at *East Croydon* were acquired and the works thereon were constructed. The 82nd section of the same

Act provided that it should be lawful for the company and they were thereby empowered to contract with any person or corporation who should be willing to sell the same, for the purchase of any lands not exceeding in the whole fifty statute acres in addition to the lands thereinbefore authorized to be taken, in such places as should be deemed eligible, for the purpose of making and providing additional stations, yards, wharfs, waiting, loading, and unloading places, warehouses, and other buildings and conveniences for receiving, depositing, loading or keeping any cattle, or any goods, articles, matters or things conveyed or intended to be conveyed upon the said railway, or for making convenient roads or ways thereto, or for any other purposes whatsoever connected with the undertaking by that Act authorized which the company should judge requisite. It was in pursuance of that section, and by agreement with the landowner, that the land acquired in 1851, upon which the cattle-dock and pens now stand, was purchased by the company, the whole quantity acquired by them under that section being still considerably less than fifty acres. The 198th section of the same Act provided that it should be lawful for the company, and they were thereby authorized, to use locomotive engines and other moving power, and to convey passengers, cattle, and other animals. Now it is clearly settled that the power to take defined lands compulsorily, and to make a line of railway thereon, and to use locomotives upon that line, entitles a company to run locomotives thereon, notwithstanding that in so doing they cause what, in the absence of such power, would be an actionable nuisance, provided always that they are not guilty of negligence: see *Rex* v. *Pease* (1); *Hammersmith Railway Company* v. *Brand* (2). The same section which enables the company to use locomotives also gives them power to convey cattle and other animals, and this power to carry must necessarily, without the assistance of the 82nd section, include the right to load and unload them; and it seems to me to follow that the company have the same right to load and unload, and to carry and convey cattle, as they have to use locomotives, and that they are as free in the one case as in the other from liability to be sued

(1) 4 B. & Ad. 30. (2) Law Rep. 4 H. L. 171.

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for causing thereby annoyance to their neighbours, provided always that negligence is absent. But it is said that these decisions only shew that where a company is authorized to do a particular act at a particular place, pointed out and defined by statute, the doing such an act there is not actionable, and that they do not apply to a case like the present, where no land is defined as that upon which the act may be done; and all that the statute does is to give the company power to take additional land, with the consent of the landowner, in such places as the company may deem eligible. In these cases it is said that the company have not any compulsory power to take, and are not under any statutory obligation to take, the land at all, much less to use it in any particular way, and therefore, if they choose to acquire the land and to use it for their own profit, they can only do so under their obligation *sic uti tuo ut alienum non lædas.* The reason why the consent of the landowner to the acquisition by the company of additional land was required seems to me to be this. Compulsory powers were given as to some lands because these lands were defined by plan and section, and the owner had notice of the intention to take them before the Act was passed. He therefore had the opportunity of opposing the Act before it became law. The same opportunity could not be given to a person who could have no notice that his land was required till after the Act was passed, and, therefore, to secure the landowner from having his land taken from him compulsorily, without any opportunity of resisting such taking, the power of selecting and taking additional land was made conditional upon the landowner's consent being first obtained. When the land has once been acquired by the company for purposes contemplated by their Act, whether voluntarily or by compulsion, it is not easy to see why on principle the company should be liable to an action for nuisance by a third party if the land was acquired voluntarily, and yet be free from liability to such action if the land was taken from its owner by compulsion; or why, if a company has two railway sidings side by side, the site of one acquired by compulsion and that of the other by consent, the liability of the company for damage caused by a spark from an engine, or the annoyance from cattle

detained in trucks, should depend upon the accident, whether the engine or trucks happened to be on the one siding or on the other.

On the other hand, it is no doubt true that when power to interfere with the rights of individuals is conferred by statute, compensation is generally given to those injured, and, as pointed out by Lord *Blackburn* in the case of *Managers of Metropolitan Asylum District* v. *Hill* (1), if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was not that the thing should be done at all events, but only that it should be done if it could be done without injury to others.

Again, the Master of the Rolls, in the recent case of the *Normanton Gas Company* v. *Pope and Pearson* (2), says: "It would have been unjust if Parliament had allowed the gas company, laying down pipes partly for the public and partly for their own benefit, to lay them down, without the consent of the landowner, in his soil, and in a way which would injure him, in fact, by taking away his right of action for a trespass or wrongful act without giving him compensation. For that reason, if there are words which are capable of doubt as to whether or not they do give a right, and there is no compensation if the right is to be held to exist, then it is the duty of every Court to say that if the words are clear and no compensation is given, the right is not given." And further on he says: "If there is any doubt about the language of the Act, or the implication to be made from it, and it is found that there is compensation given to the landowners, then the sting of the injustice is taken away, and there is no reason to prevent us from drawing the inference that the Legislature intended to give a right as against the landowners who might claim compensation for the burden imposed." Now it is not suggested that in the present case there are any special words in the statute to give a right to compensation in respect of the nuisance proved to exist; and the case of *Hammersmith Railway Company* v. *Brand* (3) is conclusive to shew that in the absence of special words there is no right to compensation; and as it is not to be presumed in the absence of

(1) 6 App. Cas. 193. (2) 32 W. R. 134, 136.
(3) Law Rep. 4 H. L. 171.

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plain and clear words that the Legislature intended to authorize the railway company to commit a nuisance with impunity, the absence of any provision for compensation affords a strong argument that the Legislature did not intend to authorize them to commit a nuisance at all.

There were two cases cited which I must now refer to. The first is *Geddis* v. *Proprietors of Bann Reservoir* (1). In that case, as in *Rex* v. *Pease* (2) and *Hammersmith Railway Company* v. *Brand* (3) the construction of particular works in a particular manner and in a particular place was authorized by an Act of Parliament. The works were constructed at that place in accordance with the provisions of the Act; damage ensued therefrom to a landowner, who brought an action against the proprietor. The House of Lords held that they were liable, not because the works which they had erected were unauthorized or improper, for that was not the case, but because they had negligently omitted to do further works the construction of which was within their powers, and which would if constructed have prevented the occurrence of the damage which was the subject of the action. The proprietors were held to be bound to use every precaution in the exercise of their statutory powers to prevent injury to other persons. And it is upon this footing that the Plaintiffs in the present case charge the Defendants with negligence in the selection of a site for arrangements which cause a nuisance, putting it upon the company to shew (1.) That they had no option but to take this land; and (2.) That they could not use it for the purposes for which they had to take it without committing a nuisance. The second case is that of the *Managers of Metropolitan Asylum District* v. *Hill* (4). That decision requires careful examination, as it was much commented on by both sides, and as it appears to me to govern the present case. In that action *Hill* and others were plaintiffs and the managers, the appellants, were defendants. The appellants were incorporated under the *Metropolitan Poor Act*, 1867, which applied to the metropolis only, and it provided for the establishment of asylums for the relief and reception of sick, insane, or infirm paupers

(1) 3 App. Cas. 430.
(2) 4 B. & Ad. 30.
(3) Law Rep. 4 H. L. 171.
(4) 4 Q. B. D. 433; 6 App. Cas. 193.

chargeable in the metropolitan unions, and for the formation of asylum districts, and directed that "for each district there shall be an asylum or asylums as the Poor Law Board from time to time by order direct." It empowered the Poor Law Board from time to time to direct the managers to purchase, hire, or build and fit up a building for an asylum of such size and nature and according to such plan as the Poor Law Board thought fit, and that the managers should carry such directions into execution; and it incorporated the *Lands Clauses Act*, except that the power of compulsory purchase was not extended to the acquisition of land for a new asylum; for that purpose land could only be acquired by agreement. The Act provided for the payment of certain expenses including those incurred for the maintenance of patients in any asylum specially provided under that Act for patients suffering from fever or small-pox. There was no other reference in the Act to small-pox specifically, but it was a matter of certainty that the sick paupers of the metropolis for whom provision was to be made must necessarily from time to time include some suffering from fever and small-pox. The appellants did acquire, erect, and maintain a new building at Hampstead as a small-pox hospital; the plaintiffs brought an action against them for a nuisance caused thereby; and the jury found that the hospital was a nuisance. The appellants contended as matter of law that they were not liable to an injunction against them upon several grounds: one was that they had, as in fact they had, followed the orders of the Poor Law Board, but as that was held to be no defence I pass it by. The second ground of defence was the same as that raised in the present case, that the appellants were protected in doing what they did by the provisions of their Act to which I have referred. Now there, as here, there was no statutory provision requiring the appellants to construct the particular works complained of on the particular site on which they were placed. Baron *Pollock*, who tried the case, pointed out that had that been so there would have been a good defence. He also pointed out that there, as here, the dispute was not between the appellants and other persons with whom any relation was created by statute, but that the plaintiffs were strangers to the appellants and to the whole matter over which the appellants had control,

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that their rights were simply those of owners and occupiers of land who suffered damage by reason of the appellants acquiring land adjoining and so using it as to create a nuisance. The learned Baron gave judgment for the plaintiffs, and granted an injunction to restrain the defendants from carrying on the asylum so as to be a nuisance, upon grounds very clearly and cogently expressed and very much in point here, but which I pass over without notice merely because the same case came on appeal before the House of Lords and was fully considered. Lord *Selborne*, in moving the judgment of the House, after commenting upon the terms of the Act, proceeded as follows (1): "The result is (1.) that this Act does not necessarily require anything to be done under it which might not be done without causing a nuisance; (2.) That as to those things which may or may not be done under it, there is no evidence on the face of the Act that the Legislature supposed it to be impossible for any of them to be done (if they were done at all) somewhere and under some circumstances without creating a nuisance; and (3.) that the Legislature has manifested no intention that any of these optional powers as to asylums should be exercised at the expense of, or so as to interfere with, any man's private rights. The only sense in which the Legislature can be properly said to have authorized these things to be done is, that it has enabled the Poor Law Board to order, and the managers to do them, if, and when, and where, they can obtain by free bargain and contract the means of doing so. If the Legislature had authorized some compulsory interference with private rights of property, within local limits which it might have thought fit to define, for the purpose of establishing this asylum to be used for the reception of patients suffering from small-pox or other infectious disorders, and had provided for compensation to those who might be thereby injuriously affected (in such cases and under such conditions as it might have prescribed) the present case might have been like *Rex* v. *Pease* (2) and the *Hammersmith Railway Company* v. *Brand* (3). No person outside the statutory line of compensation, even if the use of the asylum in the manner authorized by the statute had been productive of serious damage to him, could then have obtained any relief or remedy, upon the

(1) 6 App. Cas. 201. (2) 4 B. & Ad. 30.
(3) Law Rep. 4 H. L. 171.

footing that what the statute authorized was a legal nuisance to himself, or in itself an actionable wrong. But the case is different, when (as here) no interference at all with any private rights is authorized, and no place, or limit of space is defined, within which the establishment of such an asylum is made lawful. Neither the Poor Law Board nor the managers could for this purpose have taken a single foot of ground, or have interfered with any, the most insignificant easement, against the will of the plaintiffs, or of any other person to whom such land or easement might belong. No line is here drawn by the Legislature between interests which are, and interests which are not proper subjects for compensation. Under these circumstances I am clearly of opinion that the Poor Law Board and the managers had no statutory authority to do anything which might be a nuisance to the plaintiffs without their consent. I therefore move your Lordships to affirm the judgment of the Court below, and dismiss this appeal." This all seems to me precisely in point in the present case, and with certain verbal alterations every word of it might be repeated here by me as part of my judgment. It was indeed contended by counsel in the very clear and able argument addressed to me on behalf of the Defendant company that the passage commencing with the words, "If the Legislature had authorized some compulsory interference with private rights of property, within local limits which it might have thought fit to define, for the purpose of establishing this asylum," was altogether in their favour, because it was said that the Legislature has in this case given compulsory powers as to some land, viz., that described in the deposited plans and books of reference. But this argument fails for two reasons: In the first place, the company have not any compulsory power whatever for the purpose of establishing their cattle-dock and pens in question upon any land; and in the next place, even if they had such power, and the existence of such power did authorize the construction of these works, and the committing of a nuisance on land to which their compulsory power extended, it does not furnish any ground for holding that it would justify such acts upon land as to which no compulsory power was given. Then Lord *Blackburn* says (1): "It is clear that the burden lies on

(1) 6 App. Cas. 208.

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those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words or by necessary implication, such an intention appears. There are no express words in the Act, and I think the weight of argument is rather against than in favour of such an implication. There is no power given to take land for a site otherwise than by agreement. For, though the *Lands Clauses Acts* are incorporated by sect. 52, yet by sect. 53 so much of the *Lands Clauses Acts* as relates to the purchase of lands otherwise than by agreement, shall not be put in force except for the purpose of enlarging an existing workhouse. The asylum under this Act must, therefore, be either made by (under sect. 18) converting a workhouse into an asylum, which is not the present case, or by erecting one on land purchased or hired by agreement. In *Clowes* v. *Staffordshire Potteries Waterworks Company* (1) Lord Justice *Mellish* says (2): 'If no compulsory powers were given for the purpose of purchasing lands upon which the works were to be built, it certainly seems extraordinary that compulsory powers should be given to take away the rights of other persons, who have rights in the nature of easements over the lands so purchased.' He was discussing the question whether the party grieved retained his right to an injunction, or was compelled to seek for compensation. In the *Metropolitan Poor Act*, 1867, there is no compensation given, and the question is whether the purchase, by agreement, of the site for the asylum gave the defendants power without compensation to do what would have been a wrong to the plaintiffs if done by the former owners, which thus gives additional force to the argument of Lord Justice *Mellish* when applied to the construction of this Act. It is true that in sect. 7 it is said that 'for each district there shall be an asylum or asylums as the Poor Law Board from time to time directs.' But the construction of that is, I think, only that the managers shall make such asylums in obedience to the order of the Poor Law Board, if they can do so by exercise of the powers given them, and not to say that they must make them at all events, so as to give them additional powers to make the asylums by taking lands, or injuriously affecting lands otherwise than by agreement. I am sensible of the great difficulty that there may

(1) Law Rep. 8 Ch. 125. (2) Law Rep. 8 Ch. 139.

be in finding sites for asylums under this Act, or hospitals under the *Public Health Act*, 1875, s. 131, unless further powers be given, but that must be for the consideration of the Legislature." Again, I find Lord *Watson* saying as follows (1): "The respondents did not dispute that if the appellants or the Local Government Board had been, by the *Metropolitan Poor Act*, 1867, expressly empowered to build the identical hospital which they have erected at *Hampstead*, upon the very site which it now occupies, and that with a view to its being used for the treatment of patients suffering from small-pox, the respondents would not be entitled to the judgment which they have obtained. The appellants do not assert that express power or authority to that effect has been given by the Act either to themselves or to the Board; but they contend that, having regard to the nature of the public duties laid upon them, and the necessities of the case, it must, on a fair construction of the Act, be held that the Legislature did intend them to exercise, and authorize them to exercise, such power and authority under the direction and control of the Poor Law Board. I see no reason to doubt that, wherever it can be shewn to be matter of plain and necessary implication from the language of a statute, that the Legislature did intend to confer the specific powers above referred to, the result in law will be precisely the same as if these powers had been given in express terms. And I am disposed to hold that if the Legislature, without specifying either plan or site, were to prescribe by statute that a public body shall, within certain defined limits, provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of an hospital established in pursuance of the Act, provided that it were either apparent, or proved to the satisfaction of the Court, that the directions of the Act could not be complied with at all without creating a nuisance. In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the Legislature at the time when the Act was passed. On the other hand, I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain

(1) 6 App. Cas. 212.

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use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the *onus* of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the Legislature; and in the second place that they cannot possibly obey those orders without infringing private rights. If the order of the Legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to shew that the Legislature has directed it to be done. Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose." It will be observed that Lord *Watson* suggests that a public body might be able to justify under their Act the committing of a nuisance even where no particular site is specified. This is going a step beyond anything that is said by Baron *Pollock*, or Lord *Selborne*, or Lord *Blackburn;* but Lord *Watson* proceeds to point out clearly that this could only be so when the Legislature had imperatively ordered that certain works should be done within certain defined limits within a certain area, and that the *onus* of proving that such orders existed lay on the persons seeking to justify the nuisance. Now, in the present case, my opinion is that there are not any imperative directions of the Legislature requiring the construction of any cattle-yard and pens upon this site or upon any site

at all, and that the power to construct them is permissive only. It was contended before me that under the Act the lands were to be taken in such place as should be deemed eligible; and that the directors had found this land not only most eligible, but the only eligible site for that purpose. To meet this, the Plaintiffs' counsel endeavoured to shew there was another site called the *Fair Field* at least as, if not more, eligible; but if the *onus* of proof of any such matter were on them they failed to establish it. I have no doubt that the directors have selected the site which they, in the *bonâ fide* exercise of their discretion, considered most advantageous to their shareholders in the first place, and possibly also to the trade and public in the second; but this point also is dealt with by Lord *Watson* in the passage which I have just read, where he says that such discretion is to be exercised in strict conformity with private rights, and also when he says (1): "There is no question as to the *bona fides* both of the board and of the managers. It is clear that they acted in the honest belief that all they did was for the benefit of the community, and within their statutory powers. But that will not avail if the Act does not empower either of them, or both, in conjunction, to erect an asylum to the nuisance of neighbouring proprietors. These powers appear to me to be from first to last permissive, and not imperative." In the present case it is pleaded that the company were guilty of negligence in selecting a place for their cattle-yard and pens which was not suitable for the purpose. The fact that a nuisance is proved to exist without any negligence in the mode of conducting the business there shews that the place is not suitable for the purpose. To justify this it would, according to Lord *Watson's* view, be necessary for the company to prove, in addition to an imperative direction to erect such yard and pens somewhere within defined limits, the impossibility of erecting them anywhere else within those limits without their being a nuisance to any one. The *onus* of proving this would be upon the Defendants, and they have not proved it or even given any evidence upon the subject. Under these circumstances, I am of opinion that the Plaintiffs are entitled to an injunction. The question of damages remains.

(1) 6 App. Cas. 215.

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Now I find great difficulty in arriving at any definite conclusion as to the amount of damage which the Plaintiffs respectively have sustained, because they have drawn no distinction between the discomfort arising from the noise of the cattle while still on the premises of the company, and that arising from the use of *Lansdowne Road* by the cattle and drovers. The latter seems to me far the most felt, and yet it does not give any legal right to damages, and the company may continue to permit cattle to pass from their own premises into *Lansdowne Road*, and to use that road as heretofore. I am unwilling to send the question of damages into Chambers for further inquiries, as I know what the result will be. Affidavits would be produced in which the nuisance from the road will be kept out of sight, and the Judge in Chambers would be guided by the evidence thus produced alone—not having seen the witnesses at the trial, and not having any means of knowing how the case was then put; and the damages given would probably be more than they ought to be. It is a case in which I should be glad to have the assistance of a jury to assess the damages; but that is impossible, and I am satisfied that the matter can be dealt with more fairly by me here than in Chambers. I accordingly assess the damages of the Plaintiffs *Potter & Truman* at £10 each, and the damages of the other Plaintiffs at 40*s.* each.

I therefore give judgment for those damages, and grant an injunction to restrain the company, their servants and agents, from bringing cattle, calves, sheep, or other animals to the cattle-dock yard and pens in the pleadings mentioned, or keeping such animals there, or in trucks on the rails adjoining the same, in such manner as to be a nuisance to the Plaintiffs, or any of them. If the company will undertake to abide by an order which the Court may make as to payment to the Plaintiffs of any damage they may sustain by reason thereof I will suspend the injunction for two months, with liberty to either side to apply. The Defendants must pay the costs.

Solicitor for Plaintiffs: *John Holmes.*
Solicitors for Company: *Norton, Rose, & Co.*

C. M.

SHEFFIELD WATERWORKS COMPANY *v.* BINGHAM. PEARSON, J.

[1882 S. 1708.]

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April 4, 5, 6.

Waterworks Company—Supply of Water by Measurement—Private Baths—Meters supplied by Consumer.

The *Sheffield Waterworks Company* claimed a declaration that they were not bound under their Acts of Parliament to supply water for private baths except upon the terms of the consumer providing at his own expense a meter or other automatic self-registering instrument for the accurate measurement of the water used. The Defendant alleged that it was for the company who supplied the water to measure the quantity to be paid for:—

Held, upon the construction of the various Acts under which the proceedings of the company were regulated, that it was not correct to treat the company as supplying the water to the consumer, but it was the consumer who was entitled to draw off from the main what water he required, and to fix pipes and apparatus at his own expense for the purpose of measuring the water so taken by him; and such measurement could only be effected by some sufficient automatic self-registering meter or other instrument, or in some other equally accurate mode.

THE *Sheffield Waterworks Company*, who were the Plaintiffs in this action, claimed a declaration that the Defendant was not entitled to require from the company without their consent a supply of water for the private bath used in his house, or except upon the terms of the Defendant providing, either at his own cost or by hire from the company, and fixing, a proper meter or other automatic and self-registering instrument for ascertaining and measuring the quantity of water so to be supplied to him as aforesaid, and they claimed a declaration of the rights and liabilities of the company relating to the supply by them of water for the bath in the Defendant's house, and the measure of the water, and the means of enforcing payment for the same, and the Plaintiffs asked for an account of the arrears due to them from the Defendant in respect of water supplied to him by the company; and an injunction to restrain the Defendant from taking or using the water of the company for his bath, except upon the terms of the Defendant providing, either at his own cost or by hire from the company, and fixing a proper meter or other

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automatic and self-registering instrument for ascertaining and measuring the quantity of water so to be taken and used by him as aforesaid.

By the *Sheffield Waterworks Act*, 1853, which incorporated the *Waterworks Clauses Act*, 1847 (10 Vict. c. 17), and various subsequent special Acts, the Plaintiff company was empowered to supply water to the town of *Sheffield*, and the Defendant was the occupier of a house within the company's district. By the 79th section of the Act of 1853, the waterworks company were empowered to charge rates for the supply of water calculated upon the rent of each dwelling-house, and by the 81st section it was provided that in cases of persons requiring a supply of water for (among other purposes) baths, such supply should be furnished by the company at a rate not exceeding 10*d.* for every 1000 gallons up to 500,000 gallons per annum, which rate, by a subsequent Act, was increased by 25 per cent. for a period of twenty-five years, making 1*s.* 0½*d.* per 1000 gallons.

By the 12th section of the *Sheffield Waterworks Act*, 1860, provision was made for the appointment of competent persons to be inspectors of meters, and consumers of water were rendered liable to a penalty if they omitted to remedy any defects in their meters, notice of which should have been given by an inspector, and the company were empowered to make regulations for preventing the waste of water. The company had drawn up and circulated a scale of composition rates for water supplied for baths, varying according to the value of the house, and according to this scale there was a charge of £1 10*s.* for each bath in a house of the annual value of £100. The adoption of this scale, however, was optional and voluntary, and the baths could be supplied by meter if the owners preferred it. The Defendant had a bath in his house which was used by him and his family. The Defendant's house had only one inlet or communication-pipe connected with the service-pipe of the company, and the water, both for the domestic use of the Defendant and for the bath, passed through one and the same inlet-pipe. The Defendant insisted that the company was bound to supply the water for his bath without his providing and fixing either at his own cost or by hiring the same from the company, a meter or other automatic

self-registering instrument, and said that he intended to use the plan adopted by a Mr. *Carter*, which was as follows:—A water-line was painted round the sides of the bath at such a height from the bottom as gave a measure of thirty-two gallons, he then had a calendar hung up in the bath-room, and the servants had orders that the bath should never be filled higher than the water-line, and that the calendar should be marked on the day, so as to shew that the bath had been used, and by allowing thirty-two gallons for each time, he calculated the quantity used.

Davey, Q.C., *Curtis Price*, and *Barker*, for the Plaintiffs:—

The only question is whether the Defendant is bound to pay for the means of measuring the water or whether it is to be done by the company. The Defendant sets up a right to measure the water by means of what he calls *Carter's* method, but this system is obviously open to many serious objections, and however anxious the Defendant might be to carry out the system correctly it would be impossible for him to exercise that control over the servants and members of his family which would be necessary for effectually carrying out the system, and under any circumstances the water company would be unable to inspect or verify the measurement. Therefore we say that a meter or other automatic self-registering instrument is the only effectual mode of measurement.

It is true that in the case of the *Sheffield Waterworks Company* v. *Carter* (1) it was held that there was no provision in the company's special Act throwing upon the consumer the obligation of providing a meter to measure the water supplied for the purposes of a bath. But in a case against another Defendant, *Brooks*, which was heard at the same time it was held that although the company were not entitled to insist on the consumers providing a meter they were not liable to a penalty for not supplying water during the period when there was no meter attached to the bath.

The case of the *Sheffield Waterworks Company* v. *Wilkinson* (2) also decided that the company could not be held liable for penalties in not supplying water to an incoming tenant of a house

(1) 8 Q. B. D. 632. (2) 4 C. P. D. 410.

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until he himself had restored the communication with the main pipe.

The conclusion to be drawn from the Acts and decisions is that the consumer is the person who is to provide for the measurement of the water, and this can only be done by an automatic self-registering instrument.

Witnesses were examined in support of the Plaintiff's case including Professor *Hawksley* and Sir *Frederick Bramwell*, who stated that the means of measuring water adopted by the Defendant, and designated as *Carter's* plan, would not effect the purpose, and would give no power to the company of ascertaining the correctness of the measurement; and their opinion was that the only effectual mode by which water used for private baths could be measured was by the well-known instrument called a meter, which was an automatic self-registering instrument; and it was the invariable custom to use such instruments.

Cyril Dodd, and *R. F. Norton*, for the Defendant:—

We submit that in effect this question has already been decided in our favour, both by the Queen's Bench Division in *Carter* and *Brooks's Case* (1), and also by the Master of the Rolls in *John Edward Bingham's Case* (2). In the former of these cases it was

(1) 8 Q. B. D. 632.

(2) M.R. 1880, Nov. 11.

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THE Plaintiffs claimed that under the power given them by the *Sheffield Waterworks Act*, 1853, to charge extra for baths, they were entitled to extra payment from the Defendant for water supplied to a bath used in his private dwelling-house. The Defendant insisted that, by the context, domestic baths were excluded from the power in the Act, and he was entitled to be supplied gratis. The Act also provided that a consumer should be entitled to a supply of water for a bath either at a fixed composition rate or at a charge of 10*d.* per 1000 gallons, not specifying in what way the measurement should be made.

JESSEL, M.R., decided upon the construction of the Act that the power to charge extra for baths extended to private baths, and his Lordship's decision was affirmed on appeal (July 15, 1881). In the course of the judgment JESSEL, M.R., made the following observations as to the mode in which the quantity of water supplied to a bath by measurement was to be ascertained: "At the time the *Sheffield Waterworks Act* was passed there was no mode of measuring the water supplied, by putting a separate meter for each house. Power for that

distinctly held that the company were bound to supply water for baths, and that it was not left to their discretion; and, further, that the company were not entitled to insist on the consumer's providing a meter for the measurement of the water supplied to a bath.

In the latter case the Master of the Rolls held that there was no provision in the Acts directing that the water for the supply of private baths should be measured by meter, but that the quantity of water used might be otherwise ascertained. The Defendant in this case has raised no objection to the measurement of the water by the company in any way they may consider more satisfactory than the plan adopted by Mr. *Carter*, but what he objects to is being put to the expense of purchasing and fixing up a meter. Every duty of the consumer is strictly provided for by the various clauses in these Acts, but it is nowhere stated that the consumer is to provide a meter. The company are bound to supply the water at a fixed sum per 1000 gallons, and it is the duty of every person who supplies a commodity to ascertain what quantity of the commodity he demands payment for. If a man buys a pound of tea the vendor of the tea weighs it, and charges for the quantity he sells. It is not the duty of the purchaser to weigh the tea, or any other commodity that he buys.

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purpose was given by a later Act of Parliament. The Act does not say that it shall be measured, but you may prove the quantity of water used without measurement. You may shew that the bath used contains so much water as a minimum, and that it is used so many times during the year on an average, and you may make a charge and get damages from a jury based on such a calculation. There are many problems which are more difficult than that. The same observation applies to a water-closet or a cesspool or anything else. Evidence can be given of the average quantity used for such purposes, quite satisfactory to the mind of a Judge or jury, or both, to shew what the minimum charge should be. You must recollect the measurement is not very fine, 1000 gallons is the unit; that is not a very small quantity, and a few gallons either way will not make much difference. It appears to me that, considering what the unit is, and considering the nature of the use made of the water, there would be no difficulty in ascertaining the quantity irrespective of a meter.

The declaration will be that the Defendant is liable to pay for all water used in his bath exceeding 1000 gallons, with the option of paying a fixed charge of 30*s.* per annum."

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PEARSON, J.:—

I have formed so strong an opinion on this case that it is unnecessary for me to call upon counsel to reply.

The action is brought by the company of proprietors of the *Sheffield Waterworks* against Mr. *Charles Henry Bingham*, and the cause of litigation is a question that has been raised in various Courts as to what are the rights of the *Sheffield* proprietors under their Acts with regard to water which they may supply for baths in the town of *Sheffield*. It appears that Mr. *Charles Henry Bingham* has required the *Sheffield Waterworks Company* to supply him with water for a bath, and the only remaining question at the present moment to be decided between them is this, whether, inasmuch as the water so supplied to the bath is to be paid for by measurement, Mr. *Charles Henry Bingham* is bound to pay the expenses of measuring that water so taken, or whether, according to his contention, the waterworks company are liable to pay those expenses. The main Act, as I may call it, of the *Sheffield Waterworks Company* is an Act which has been referred to as passed in 1853. It was not the earliest of their Acts, but it is at the present moment the substantial Act in question. And under that Act the *Sheffield Waterworks Company* are bound to supply in the first place water for domestic purposes exclusive of baths; then by sect. 81 they are bound to supply water for baths to persons who may require it, and the persons who require water to be supplied for baths are to pay for the water so supplied by measurement: for 1000 gallons 10*d.*, and for anything beyond 1000 gallons up to 500,000 gallons at the same price, and at rather a lower price for any amount of water beyond the 500,000 gallons. The Act having been passed in 1853, after the accident which happened to the *Sheffield* reservoir the *Sheffield Company* got a subsequent Act which enabled them to increase that 10*d.* by 25 per cent. for a number of years, which will come to an end in the year 1889, so that the sum which has to be paid now is not 10*d.* but 1*s.* 0½*d.* The first question that was raised, so far as I know, between the occupiers of houses in *Sheffield* and the waterworks company—at least the first question that is material to this case—was the

question whether or not the *Sheffield Waterworks Company* were absolutely bound to supply water when required for baths—whether they could be compelled against their will to supply water for baths—or whether they were only allowed to supply water for baths, and could only be asked to supply it, their consent being necessary to that supply. That identical question seems to me to be raised by the pleadings here, although Mr. *Davey*, who opened the case for the waterworks company, very fairly admitted that that case had been decided against the waterworks company by a decision of the late Master of the Rolls and affirmed by the Court of Appeal. So that there is now, as I understand, no dispute on behalf of the waterworks company that there is a compulsory obligation on them to supply water to any persons who choose to require it for the purpose of their baths.

Barker.—We do not go quite so far as to admit that; but we do not raise the question before your Lordship to-day. The question before the Master of the Rolls and in the Court of Appeal in the action against the other Mr. *Bingham* was whether the company were entitled to charge extra for water for a bath, or whether it was included in the term "domestic purpose."

PEARSON, J.:—So I see, according to the argument: but I have not the pleadings in that case before me, and I find it very difficult to discover from the judgment what the real question there was; Mr. *Davey* however declined to argue the question, and I must hold it to be admitted, at all events for the purpose of my decision here. That being so, it is not contested that Mr. *Bingham* has a right to require the *Sheffield Waterworks Company* to supply water to his bath, and they have done so. The company having therefore supplied water to his bath, he has, to a certain extent and according to his own fashion, measured the water which has been so supplied; and, as I gather from it, he has in substance pursued the method which was pursued by Mr. *Carter*. He has not stated exactly in his pleadings what he has done, but I gather from his defence that in substance he has adopted the same mode that was adopted by Mr. *Carter*, which is this: He has on his bath a certain line drawn, which line shews that

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when the bath is filled up to that line there is a certain quantity of water in the bath. Then he has directed all members of his household using the bath not to go beyond that line, and to enter upon a calendar which is suspended in the bath-room a note of every occasion upon which the bath is so used. I do not think it needs any observations from me to shew that that must be a most unsatisfactory mode of measuring the water taken and used for the bath. I will put only one instance, and an instance that may occur every day in the week, which will shew how impossible it is to measure at all accurately the quantity of water used upon any occasion. I will suppose a nurse wishing to bathe a child in the bath, and having filled the bath up to that line she finds that the water is a good deal too hot to put the child into. I want to know what she will do? Certainly, she will not wait half-an-hour till the water has got cool. She will either put some more cold water in, and thus transgress the rule of not going beyond the line, or allow some water to go out through the waste pipe and then fill it up with cold water, for which there will be no mark at all to identify how much water has been used. A number of cases may be suggested which will shew that this is a most imperfect and incorrect way of measuring the quantity of water used, and, at all events, it leaves the whole thing to depend upon what I may call the infallibility of all the members of the household so that they shall never transgress the rule with regard to the use of the bath, and always remember accurately to note what they have done when they have been using the bath.

That being so, the proprietors of the waterworks were naturally dissatisfied with what Mr. *Bingham* was doing, and they have required Mr. *Bingham* to use a meter. They say the only possible way of measuring accurately the water that is taken is by the use of an automatic meter which will register for itself, and register for everybody, the quantity of water that has been taken. Mr. *Bingham*, who I must say has acted very fairly and in a very proper manner in this case, subject, of course, to what his rights may be, says, I am perfectly willing the water shall be measured in any way you like, and if you choose to put one of your meters to measure the water I am perfectly willing you shall put one of those meters; but I say that I can never be compelled to put a

meter myself, nor can I be compelled to rent a meter from you; I say there is nothing in the Act of Parliament which requires me to put a meter, and all that I have to pay is rent for the water and not rent for the meter. Accordingly, the question I have to determine really is this—whether or not Mr. *Bingham* is right in his contention, whether it is Mr. *Bingham's* duty at his own expense to measure the water which is taken, or whether he is accurate when he says that it rests with the waterworks company alone to measure the water which they supply. Now, the argument of counsel for the Defendant has been this: You, the waterworks company supply the water, and it is to be paid for by measurement, you are therefore the persons who ought to know exactly what you supply. You are the persons, therefore, who ought to measure the water that you supply, and to charge me with the exact quantity of water which you so supply, and the Defendant's counsel said it was exactly similar to this: that if instead of water it had been tea, and they had been bound to supply tea at so much a pound, they would have had to weigh the tea themselves and deliver so many pounds of tea, and then they would have charged for the pounds of tea which they had delivered, and the purchaser would not have been put to the expense of weighing the tea.

Now, in order that I may put as shortly and as clearly as I can the grounds of my decision, and shew what I conceive to be the fallacy of this argument, I must just state exactly how this water is supplied. The *Sheffield Company* are bound to put mains down the streets. They are bound to keep those mains charged with water at high pressure now, and having done that every householder in *Sheffield* is free either to make use of the water in that main or to decline to make use of it as he pleases. If he desires to make use of it, he himself makes the communications between his own house and the main, subject of course to all proper provisions for taking care that he does no injury to the waterworks company in making the connection; and subject also to this, that the connections must be properly made, so as not to abstract more water than he is entitled to take, and not to do any injury of any sort or description to the waterworks company. For the domestic purposes he pays a rent, about which there is no dispute.

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If he chooses to say that he wishes to have a bath supply, he is at liberty then to have his bath, and, on giving notice to the company, to make such a connection between the service-pipe and his own house and the bath as will bring the water to the bath, and to draw off from the service-pipe such water as he requires for the bath. It is plain, therefore, that the whole fallacy of the argument of the counsel for Mr. *Bingham* lies in this, that he treats the company as supplying the water, whereas the proper thing would be to say that he is at liberty to draw off himself the water for the bath. He takes the water. It is not the company that supply it, and if he takes the water and gives it to himself, he is the only person who can, and he is the only person who must, measure the water that he so takes, and tell the company how much water he has taken.

On that simple ground I come to the conclusion that the consumer is the person who must measure the water. He is indeed the only person who can measure it, because the company do not know either at what time, or under what circumstances, or in what quantity he may be minded at any moment to take the water for the use of the bath, and upon that ground, and that ground alone, I should come to the conclusion, if I had to deal with this matter as *res integra*, that Mr. *Bingham* and every other consumer is bound himself to measure the water which he takes, and to keep a record of it, and to inform the company how much he has taken and how much he is liable to pay for.

The only question I have to consider upon this part of the case is, whether there is or is not anything in the Acts of Parliament which militates against what I conceive to be both the common sense of the matter and the necessity of the case. Now, so far from that, what little I do find in the Acts is decidedly in favour of that construction, because, turning to the Act of 1860 and looking at the 12th and 16th sections, I find the Legislature was under the impression that meters would be used, that the meters would belong to the consumers rather than to the company, that inspectors of the meters were to be appointed by the council of the borough to act impartially between the consumers and the waterworks company, and that whenever the meter belonged to the consumer, and the inspector found that the meter was

defective, the inspector was to give notice of that to the consumer, and the consumer was bound to repair the defective meter or to replace it by a new one. It seems to me that these provisions could not have found their place in the Act of Parliament unless it had been that the Legislature treated the consumer as I treat the consumer, as the person who was taking the water for his own use, and the person who was therefore bound to measure that which he took, in order that he should pay honestly for it.

Now that being so, if the matter rested there, I should come without any doubt in my own mind to the conclusion that that was the proper construction of the Act, and that I must so determine. But this was met very properly by Mr. *Dodd*, who says the case is really not open for me to consider, because he says, and says with great force, that this very point has already been determined by a Court of co-ordinate jurisdiction, for it came before the Divisional Court of the Queen's Bench Division in two cases which were brought up from the magistrate at *Sheffield*, the case of *Sheffield Waterworks Company* v. *Carter* and the same company against *Brooks* (1). Mr. Justice *Cave*, giving in that case the decision of himself and Mr. Justice *Mathew*, says this—I am quoting from page 646—"These considerations enable us to answer the question put to us in *Carter's Case*, which is, whether the company are entitled to insist on meters, and meters only, being used by their customers to measure the supply of water to their baths; and we are of opinion that this question must be answered in the negative, and consequently that the conviction must stand, and the appeal be dismissed with costs."

Now I have two or three observations to make upon that case. I need hardly say that if it had been a case in which the question had been raised *simpliciter* in the manner in which this question has been raised before me here, I should have felt myself bound to have followed the decision of the Divisional Court and, without exercising any judgment of my own, I should not have heard the case through. But the first observation I wish to make is this: that the case came before the Divisional Court under very different circumstances from those under which it is presented to me. The question presented to me is whether

(1) 8 Q. B. D. 632.

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the waterworks company are to measure, or whether the consumer is to measure. Now the passage that I have read from the judgment of the Divisional Court does not answer that question. What Mr. Justice *Cave* says is this: that the question he answers is whether the company are entitled to insist on meters and meters only being used by their customers to measure the supply of water to their baths. That is not the question before me. The question before me is who is to measure the water? That is not the question that Mr. Justice *Cave* decides. The second observation that I desire to make upon that is this: The question there was whether or not the company were entitled to cut off the supply of water entirely from the house for domestic purposes as well as for baths, because the consumer did not measure his water by a meter. Now it may well be that such a case may be decided against the company on the ground that whether he measured by a meter or whether he did not measure by a meter, they nevertheless had no right to cut off the water for ordinary purposes, simply because something was done that was not correct with regard to the supply of water to the bath.

The third observation I wish to make is this, that I think the judgment of any Court ought to be taken most carefully with reference to the matter which is before it at the time. No one knows better than I do, even after the short experience I have had, how exceedingly difficult it is to express oneself so as to be perfectly sure that when the judgment comes to be read afterwards the words used shall not seem to be very much larger than they were thought to be at the time they were used. At the time when I am addressing the Court I know that those before me see exactly to what point it is that I am addressing myself, and they will understand the words in the restrictive sense in which I am using them, but when they come to be printed apart from much that has taken place in Court they very often seem to be capable of a larger construction, which neither the Judge nor the counsel who heard them can have for one moment thought of putting upon them. I can only say, having given a good deal of attention to this case, that I believe the learned Judges who decided that case would think I was erring very greatly indeed, and charging them with something they never intended to do, if I

were to come to the conclusion that they had any notion of deciding the question which is before me to day. I do not, therefore, feel myself at all bound by the judgment in the case of the *Sheffield Waterworks Company* v. *Carter* (1). I assume that that judgment was perfectly accurate at the time when it was delivered with reference to the circumstances under which it was delivered, but I do not think it touches the case which is before me and which I have to decide.

Then it was said that there were observations in the Master of the Rolls' judgment on the case against Mr. *Bingham's* brother before him, which shewed that a meter was not necessary, and I admit that there are observations in the Master of the Rolls' judgment which go to shew that he thought that the water taken need not be measured very accurately, because, as he says, the unit is 1000 gallons, and which go also to shew that he thought a meter was not necessary. I do not intend to decide that a meter is necessary. I do not think that the decision I shall give to-day will really militate against any decision of the Master of the Rolls, although I say frankly that I am unable to follow him to the full extent of the observations which he seems to have made when speaking upon that subject, because when he says that extreme accuracy is not required, it seems to me that extreme accuracy really is necessary to shew whether you have got up to the first limit of 1000 gallons or not. According to his opinion, and according to what I assume to be the right construction of the Act of Parliament, if less than 1000 gallons are taken, there is no payment at all to be made to the company. It therefore becomes very material to know whether you have taken 1000 gallons or whether you have taken 100 gallons, and therefore upon one point at all events accuracy is necessary. What I mean to decide and what I do decide upon the present occasion is this, that the consumer who takes the water is the person who is bound at his own expense to measure the water, and to record that measurement.

That I think disposes of the whole case that is before me, and the only question is as to the form in which my judgment should go. Of course I am not going to decide that any particular

(1) 8 Q. B. D. 632.

PEARSON, J. 1883 SHEFFIELD WATERWORKS COMPANY v. BINGHAM.

meter should be used. There is no evidence before me to shew that any one particular meter is the only meter by which you can measure the water. All I am going to decide is that Mr. *Bingham* must at his own expense measure the water and record that measurement, and that he must give of course all facilities to the company to ascertain that he has measured the water, and that he has measured it in some way or other which is an accurate way of taking the measurement. I may further decide that the mode which has been adopted up to the present time by Mr. *Bingham*, which I take to be substantially *Carter's* mode of measurement, is a very insufficient and improper mode of measuring the water. Therefore, what I shall declare is this: "That the Defendant is bound at his own expense to measure by some sufficient meter or other instrument, or in some other sufficient way, and to record the amount of water taken from time to time for the use of his bath."

It was suggested by counsel for the waterworks company that words should be inserted in the decree shewing that the Defendant must use some automatic self-registering instrument or some other sufficient mode of measurement.

PEARSON, J.:—

I do not wish to put any obstruction in the way of science, and I do not know what mode of measuring water may be discovered, therefore I would not bind Mr. *Bingham* for all time to use the particular meter now employed or any other special instrument. The real question before me is whether Mr. *Bingham* is bound to purchase the meter or rent it from the company, and as he has acted reasonably hitherto, I have no doubt he will act in the same spirit hereafter, but there can be no objection to inserting the words "by some automatic self-registering instrument, or in some other equally accurate way."

The decree was finally settled in the following terms:—

The Plaintiffs by their counsel having admitted, for the purpose of this action only, that the supply of water for the bath in the Defendant's house called *Brinklands*, in the pleadings mentioned, is compulsory on the Plaintiff

company: Declare (1) that the supply of water for the said bath in the Defendant's house is compulsory on the Plaintiff company; and declare (2) that the Defendant is bound at his own expense to measure accurately by some sufficient automatic and self-registering meter or other instrument or in some other equally accurate way, and to record the amount of water taken from time to time and used in such bath, and to permit the Plaintiffs at all statutory times to inspect his (the Defendant's) mode of measuring and the record of the quantity of water so taken.

Let the Defendant *Charles Henry Bingham* be restrained by injunction from taking or using the water of the Plaintiffs for his said bath except upon the terms of and in accordance with the terms of the declaration lastly hereinbefore contained. And upon the application of the Defendant's counsel it is ordered that the said injunction be suspended for one calendar month from this date. And it is ordered that the sum of £3 in Court to the credit of this action be paid to the Plaintiffs or to Mr. *William King*, their solicitor or agent. And the Defendant undertaking to pay to the Plaintiffs £1 10s., being the balance of the arrears due from the Defendant to the Plaintiffs, inclusive of the quarter ending the 25th of March 1882, in respect of the water supplied by the Plaintiffs for his said bath, according to the estimate mentioned in the 14th and 16th paragraphs of the Plaintiffs' statement of claim, and the Plaintiffs undertaking to pay to the Defendant his taxed costs of this action, Let the Defendant *C. H. Bingham* on or before a day to be named pay to the Plaintiffs the said sum of £1 10s., and let the costs of the Defendant *C. H. Bingham* be taxed by the Taxing Master, and let the Plaintiffs pay to the Defendant *C. H. Bingham* the amount of his said costs when so taxed.

Solicitors for the Plaintiffs: *Pattison, Wigg & Co.*, agents for *B. P. Broomhead, Sheffield.*

Solicitors for the Defendant: *Pitman & Son.*

T. W. G.

PEARSON, J.

1884

Jan. 12.

In re BEDSON'S TRUSTS.

Will—Construction—Life Estate determinable on Bankruptcy—Gift over to Children—Time for ascertaining Class.

A testator gave a fund to trustees, upon trust to pay the income to his son during his life, and after his death to pay and divide the fund equally amongst all the children which the son might have, as and when they should respectively attain twenty-one, and, if there should be no child who should attain twenty-one, the fund was to sink into the residue of the testator's estate. There was a proviso that, if the son should be adjudicated a bankrupt, the fund, and the income thereof, should thenceforth immediately go and be payable or applicable to or for the benefit of the child or children of the son, "in the same manner as if he was naturally dead," or, in default of such child or children, should sink into the residue. After the death of the testator the son was adjudicated a bankrupt. At the date of the adjudication he had two children; other children were born to him afterwards:—

Held, that the children born after the adjudication, as well as those born before, were entitled to share in the fund, subject to the contingency of their attaining twenty-one.

In re Aylwin's Trusts (1) observed upon.

THIS was a petition under the *Trustee Relief Act*.

C. R. Webb Bedson by his will, dated the 5th of September, 1853, gave a sum of £1200 to trustees, upon trust during the life of his son *James* to pay the income thereof to him, for his own use and benefit, and after his death upon trust to pay and divide the £1200 "unto and amongst all the children which my said son *James* may have, share and share alike, as and when they shall severally and respectively attain the age of twenty-one years, and if he shall have but one child then to such only child, or to the legal personal representatives of such children or child respectively. And, in case my said son *James* shall die without leaving any such child or children, or leaving such in case he, she, or they shall die under the age of twenty-one years, then I direct that the said sum of £1200 shall sink into and become and form part of the residue of my residuary estate and effects: Provided always, that, if my said son *James* shall commit any act of bankruptcy, whereupon and under which he shall be declared or adjudicated a bankrupt, or if he shall make any composition with his creditors, or shall

(1) Law Rep. 16 Eq. 585.

take the benefit of any Act or Acts passed or to be passed for the relief of insolvent debtors, or do, or permit, or attempt to do any other act, matter, or thing whereby to assign, charge, alienate, or incumber the said interest, dividends, or proceeds hereinbefore given, or directed to be paid to, or provided for, him, contrary to the true intent and meaning of this my will, then, and in any of these cases, the said sum of £1200, and its interest, dividends, and proceeds, shall thenceforth immediately go and be payable and applicable to or for the benefit of the child or children of my said son *James*, in the same manner as if he was naturally dead, or, in default of such child or children, shall sink into and become and form part of the residue of my said estate and effects."

And the testator gave another sum of £1200 to the trustees, upon trust during the life of his son *William John* to pay the income to him or for his benefit: "And after his death do and shall pay the last mentioned principal sum to his child or children, or his, her, or their legal representatives, in such and the same way and manner in all respects, and at such time or times, as hereinbefore directed, mentioned, and expressed of and concerning the before mentioned legacy or sum, and its interest, dividends, and proceeds, hereinbefore given to or in favour of my said son *James* and his child or children, and his, her, or their representatives. And it is my will, and I do hereby expressly direct, that the bequest and trust hereinbefore contained and declared of and concerning the said legacy or sum, and its interest, dividends, and proceeds, to or in favour of my said son *William John* and his child or children, or his, her, or their legal representatives, shall be subject and liable to such and the same directions, regulations, restrictions, limitations, clauses, conditions, and provisions as are hereinbefore mentioned, expressed, and contained of, or concerning, or relating to the bequest of the before mentioned legacy or sum, and its interest, dividends, and proceeds, hereinbefore given to or in favour of my said son *James* or his child or children, or his, her, or their representatives, in the same manner to all intents and purposes whatsoever as if such directions, regulations, restrictions, limitations, clauses, conditions, and provisions, were here again inserted and repeated."

The testator died on the 20th of June, 1858. The son *William*

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John was, on the 23rd of September, 1865, adjudicated a bankrupt. At that time he had two children, viz., *Alice Sophia Gertrude Bedson*, who was born on the 5th of May, 1862, and *Ada Marian Bedson*, born on the 13th of March, 1864. On the 5th of December, 1872, the trustees paid the fund into Court. After the adjudication of bankruptcy *W. J. Bedson* had four other children born to him respectively, in 1874, 1876, 1878, and 1881.

This petition was presented by the two daughters, *Alice* and *Ada*, who were born before the bankruptcy (of whom *Alice* had attained twenty-one), and it asked that, after payment of costs, one moiety of the fund might be transferred to the daughter *Alice*, and that the other moiety might be carried over to an account to be intituled, "The account of the contingent or other share of *Ada Marian Bedson*," in the sum of £1200.

Alfred Bailey, for the Petitioners:—

There is peculiar force in the expression "as if he was naturally dead."

[PEARSON, J:—The son might be unmarried and become a bankrupt; then he might afterwards marry and have children. But, on the other hand, he might become bankrupt, having a wife and children, and after the bankruptcy more children might be born to him of the same wife. Was it intended to exclude some of that wife's children?]

If the son was dead, the class of children who were to take could not be increased: *Whitbread* v. *Lord St. John* (1). The class of children who are to take is to be ascertained at the date of the bankruptcy: *In re Aylwin's Trusts* (2).

[PEARSON, J.:—I am not at all sure that in *In re Aylwin's Trusts* Vice-Chancellor *Wickens* did not intend only to decide that the four children of the tenant for life who were living at the date of his insolvency took the rents between them until other children should be born.]

Rochford v. *Hackman* (3) is distinguishable, because there there was only an implied limitation over to children of the tenant for life in the event of his bankruptcy.

(1) 10 Ves. 152. (2) Law Rep. 16 Eq. 585.
(3) 9 Hare, 475.

W. Brinton, for the children born since the bankruptcy, was not heard.

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In re BEDSON'S TRUSTS.

PEARSON, J.:—

In my opinion the proper construction is, that the children who have been born since the date of the bankruptcy are entitled to share in the fund, contingently, of course, upon their attaining twenty-one. There is no question as to whether the £1200 went over on the bankruptcy; it is admitted that it did. The question is whether, upon the happening of the bankruptcy, the £1200 went over absolutely to the two children then living, or whether it went over to all the children whom *W. J. Bedson* might have, or rather to the two children then existing, subject to letting in any others who might be afterwards born. I will express no opinion whether if, at the time of his bankruptcy, he had had no children, and children had been afterwards born to him, the fund would, on the bankruptcy, have at once sunk absolutely into the residue. I have not to dispose of that question. The fund cannot now fall into the residue at all, because one of the children has attained twenty-one. It is said that the words "as if he was naturally dead" mean that the line is to be drawn at the date of the bankruptcy, and that no child born after that date can possibly take any part of the fund. To my mind the proper meaning of the words is this, that the devolution is to take place in the same way as if the son had been then dead, that is to say, the fund is to devolve upon all his children who shall attain twenty-one. I cannot conceive that the words were intended to exclude the afterborn children. In my opinion they simply mean that the fund is to go to such children or child of the son as shall attain twenty-one, and this view is further strengthened by the words of the gift over in default of children. I can see no reason whatever for cutting down the class of children who are to take. That would be a very harsh construction, and I should have been very sorry if the terms of the will had compelled me so to decide.

Solicitors: *Chester, Mayhew, & Co.*, agents for *Cooper & Chawner, Uttoxeter.*

W. L. C.

PEARSON, J.

1884

Jan. 12.

SMITH *v.* OLDING.

[1883. S. 3000.]

Practice—Mortgage—Foreclosure Action—Several Defendants—Time for Redemption.

Where there were two Defendants to a foreclosure action—the mortgagor and a second mortgagee who had joined in the Plaintiff's security to postpone his previously prior right, and as surety for the Plaintiff:—

Held, that only one period of six months should be allowed for redemption by both Defendants.

Bartlett v. *Rees* (1) and *General Credit and Discount Co.* v. *Glegg* (2) followed.

THIS was an action by a mortgagee of leasehold property for the foreclosure of the mortgage. The Defendants were *John Olding*, the owner of the equity of redemption, and *Edmund Coste*, who had been a prior mortgagee of the property, but who, as surety for *Olding*, had joined in the mortgage to the Plaintiff and had agreed to postpone his security to that of the Plaintiff.

The action now came on for trial upon a motion by the Plaintiff for judgment, according to the terms of minutes annexed to a notice of motion dated the 11th of December, 1883, which had been served on the Defendants. The Defendants did not appear, but there was an affidavit of the service of the notice of motion upon them.

The minutes provided that both the Defendants should be absolutely foreclosed in the event of their not paying to the Plaintiff the amount which should be found due to him on his security within six calendar months after the date of the Chief Clerk's certificate.

Coltman, for the Plaintiff:—

The only question is whether one period for redemption should be fixed for both the Defendants, or whether there should be successive periods for redemption. In *Bartlett* v. *Rees* only one period for redemption was allowed. This was followed by

(1) Law Rep. 12 Eq. 395. (2) 22 Ch. D. 549.

Vice-Chancellor *Bacon* in *General Credit and Discount Co.* v. *Glegg* (1), but in *Sweet* v. *Combley* (2) (unreported) Mr. Justice *Fry* refused to apply the same rule in the absence of the mortgagor.

PEARSON, J., held that the minutes were right as they stood. Only one period for redemption ought to be allowed for both the Defendants.

Solicitors for Plaintiff: *Alfred Hicks & Arnold.*

(1) 22 Ch. D. 549.
(2) 1882. March 17.

SWEET *v.* COMBLEY.

[1881. S. 5663.]

THIS was a foreclosure action by first mortgagees (who were in possession of the mortgaged premises) against a second mortgagee and the mortgagor. The action was set down for trial as a short cause on motion for judgment in default of pleading against the second mortgagee, and in default of appearance against the mortgagor. The minutes of judgment as prepared by the Plaintiffs' counsel gave one period of six months for redemption by both the Defendants.

Leonard Field, for the Plaintiffs, moved for judgment according to the minutes. He referred to *Bartlett* v. *Rees* (Law Rep. 12 Eq. 395).

A. Whitaker, for the second mortgagee.

FRY, J., declined, in the absence of the mortgagor, to depart from the ordinary practice of allowing successive periods for redemption to the Defendants.

On the undertaking of the Plaintiffs to pay the second mortgagee's taxed costs of the action, the second mortgagee then consented to an immediate foreclosure judgment against him. The ordinary foreclosure judgment was made against the mortgagor.

Solicitors: *Wood, Latham & Bigg*; *Whitakers & Woolbert.*

W. L. C.

PEARSON, J.

1884
Jan. 22.

In re RAY'S SETTLED ESTATES.

[1883 R. 920.]

Settled Land—Sale or Lease by Tenant for Life—Notice to Trustees—Lunatic Tenant for Life—Notice by Committee—Sanction of Court of Lunacy—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 45, 62.

The notice, to be given, under sect. 45 of the *Settled Land Act*, 1882, by the tenant for life of settled land to the trustees of the settlement for the purposes of the Act, when he is intending to make a sale or lease, must be—not a merely general notice of an intention to sell or lease all or any part of the estate at any time after the expiration of one month from the date of the notice as and when a proper opportunity shall from time to time occur—but a notice of a specific sale or lease which is contemplated at the time when the notice is given.

The committee of a lunatic tenant for life cannot give a valid notice under sect. 45 unless he has previously obtained authority from the Court of Lunacy to do so.

THIS was a summons by the trustees of the settlement created by the will of *H. B. Ray* deceased, dated the 19th of February, 1856, appointed for the purposes of the *Settled Land Act*, 1882, by an order of the Court, dated the 5th of May, 1883, asking a declaration that a notice served on them on the 6th of November, 1883, on behalf of the tenant for life, of an intention to sell or let the property, was not such a proper and sufficient notice as required by sect. 45 of the Act.

The tenant for life was a lunatic, and the order of the 5th of May was made on his application by his committee. The committee had on the 13th of April, 1883, obtained an order in lunacy, giving him liberty to take such proceedings as might be necessary for the purpose of procuring the appointment of trustees for the purposes of the *Settled Land Act*.

The notice now in question was given by the committee of the lunatic's estate on his behalf. It was entitled "In the matter of the estates settled by the will of *H. B. Ray*," and was as follows: "Take notice that *H. R. Ray* (a person of unsound mind by *A. L. Wheeler* the committee of his estate) intends to make a sale or lease of all or any part of the said settled estate at any time or times after the expiration of one month from the date of

this notice, as and when a proper opportunity for making any sale or lease in accordance with the powers and provisions of the *Settled Land Act*, 1882, shall from time to time occur."

The committee had not obtained any order from the Court of Lunacy authorizing him to give this notice. The settled estates consisted of various properties in the counties of *York*, *Middlesex*, *Kent*, and *Surrey*, the total rentals of which amounted to more than £4000. The estate comprised some building land in the neighbourhood of *London*.

Cozens-Hardy, Q.C., and *Methold*, for the Trustees:—

A merely general notice such as this is not a sufficient notice within sect. 45 (1). The object of giving the notice is to enable the trustees at their own risk to intervene in a proper case to prevent the sale. The notice ought to be directed to the sale or lease of some definite property. If the present notice is good, every tenant for life, by giving a similar notice the moment he succeeds to the property, will, after the expiration of a month, be absolutely

Sect. 45 "(1.) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice addressed to the trustees, severally, each at his usual or last known place of abode in the *United Kingdom*, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the *United Kingdom*, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

"(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

"(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section."

Sect. 62. "Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor or other person intrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate."

PEARSON, J. 1884 *In re* RAY'S SETTLED ESTATES.

free from the control of the trustees for the remainder of his life. The notice ought to be a notice of a present intention to sell some definite property. Any other construction would render the provisions of the Act for the protection of the remainderman nugatory. The tenant for life can before giving the notice enter into a conditional contract for sale.

Another objection to the notice is that before giving it the committee ought to have obtained the sanction of the Court of Lunacy; sect. 62.

[They were stopped by the Court.]

Wolstenholme, and *Dunning*, for the committee:—

Sect. 45 requires nothing more than a general notice of an intention to sell at some time or other.

[PEARSON, J.:—How do you get over the words "before the making of the sale"?]

To make a sale is substantially the same thing as to sell. If such a general notice is not sufficient, no sale by private contract can ever be made under the Act. A binding contract could not be made for a month; the matter must be left open for a month in order to see whether the trustees or the remaindermen would object to the sale. No purchaser could be found for a mere option of this kind. A general notice would be useful to the remaindermen, and the tenant for life, being placed by sect. 53 of the Act in the position of a trustee for the remaindermen, would be bound afterwards to communicate to them every particular relating to the estate. *Wheelwright* v. *Walker* (1) affords an instance of the benefit of this provision.

[PEARSON, J.:—The only object of appointing trustees is to protect the remaindermen against an improper sale by means of a notice under sect. 45. If a vague notice like this is sufficient there is no protection at all.]

The tenant for life is entitled to sell in opposition to the wishes of the remaindermen, provided that he is not selling improperly: *Thomas* v. *Williams* (2). It is sufficient for the remaindermen to know that the estates will be sold at the first favourable

(1) 23 Ch. D. 752. (2) 24 Ch. D. 558.

opportunity. They can ask the tenant for life to give them the particulars of sale and to tell them the reserved price. If such a general notice is not sufficient, the only alternative in the case of a sale by private contract will be to give the trustees notice of every term of the contract; a copy of the contract must be sent to them. Suppose the estate consists of building land, is every intending tenant to wait a month before he can obtain a binding contract for a lease? This would render it practically impossible to deal with such an estate at all. The same difficulty would arise in selling a large estate in lots. The notice is to be given before the contract is entered into, *i.e.*, before the terms of the sale are ascertained. How can any notice but a general one be given before the terms have been arranged? The purchaser might wish to reduce the amount of his purchase-money, or he might object to the length of the title shewn; a new notice would then have to be given. There is no middle course between a general notice and a notice of every particular of the contract. The latter course is impracticable. In the present case the sanction of the jurisdiction in Lunacy must be obtained to every contract, and this will be an ample protection to every one.

Cozens-Hardy, in reply:—

If such a notice is good for a sale or a lease it would be equally good for a mortgage or a partition. The notice does not say under what circumstances or when the sale is to take place.

[PEARSON, J.:—I feel that there are difficulties on both sides. But this seems to me to be a *bonâ fide* notice of a present intention to sell as soon as possible. Notwithstanding what Mr. *Wolstenholme* has said I do not think a merely general notice would be sufficient. In the case of a sale by auction there would be no difficulty in saying, I intend to sell such an estate on such a day and at such a place. In the case of building land there would be no difficulty in saying, I have plotted out the land and I intend to let the plots as soon as I can. In the case of a sale by private contract will not a notice of a present intention to sell as soon as the tenant for life can get his price be sufficient?]

In this case there can be no present intention to sell, because

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the committee has not obtained the sanction of the Lunacy jurisdiction.

[PEARSON, J.:—I do not see what right he has to give the notice without the sanction of the Lunacy jurisdiction.

Wolstenholme:—This is not an exercise of the powers of the tenant for life under the Act; it is a mere preliminary. It is incidental to the management of the estate in the lunacy. And the order of the 13th of April, 1883, which authorized the committee to make the application for the appointment of trustees, also by implication authorized him to give the notice.]

There is never any difficulty in entering into a conditional contract for the sale of property which is under the control of the Court, *e.g.*, in an administration action, and it will be equally easy for a tenant for life who wishes to sell by private contract, or to let, under the provisions of the *Settled Land Act*, to enter into conditional contracts. If the argument on the other side is sound, a merely general notice of an intention to do any of the other things mentioned in sect. 45 at some time or other would be valid. How can the trustees take advice for their guidance, unless the notice tells them of a present intention of the tenant for life to do a specific thing which they can consider?

PEARSON, J.:—

No doubt this summons raises an exceedingly important question, and I may add, speaking for myself, a question also of considerable difficulty, for the section is so worded as not to tell the Court exactly what the form of the notice is to be. [His Lordship read sect. 45.] The question now raised is as to the form of the notice and the time at which it ought to be given. In the present case the tenant for life is a lunatic. On the 6th of November, 1883, the committee of his estate served on the trustees of the settlement, who have been appointed by the Court for the purposes of the Act, a notice in the following terms:— [His Lordship read the notice.] The notice speaks of "the said settled estate," but as it is headed "In the matter of the estates settled by the will of *H. B. Ray*," I must understand the word estate in the body of the notice to mean estates. The question is

whether that is a sufficient notice under sect. 45. Two objections have been taken to it, and I will deal with the second objection first. It arises thus: The notice is given by the committee of the lunatic. Now, of course, a lunatic can have no intention; he can act only by his committee. The intention to sell must be that of the committee acting on behalf of the lunatic, and the committee has given the notice without obtaining the previous sanction of what I may call the Court of Lunacy. To my mind that is a fatal objection to the notice. I do not understand how the committee has any right to act except under an authority given to him by the Court of Lunacy.

But, apart from that objection, and assuming that the committee is proposing, with the sanction of the Court of Lunacy, to exercise the powers conferred on a tenant for life by the Act, a very serious question arises whether the notice is a proper one. It is in form a general notice, not relating to any particular sale or lease which is at present in contemplation, but it is a perfectly general notice of an intention to exercise the powers given by the Act to the tenant for life from time to time when a proper opportunity shall occur. The question is whether such a general notice is sufficient under sect. 45, or whether the section does not intend a notice of some particular sale or lease in contemplation at the time when the notice is given. After great doubt, and without any misappreciation of the difficulties which were pointed out by Mr. *Wolstenholme*, I have come to the conclusion, upon the words of the section, that the notice must be a notice of a specific and particular sale or lease which is contemplated at the time when the notice is given. I say that I have come to this conclusion on the words of the section, because these words are that the tenant for life is to serve the notice on the trustees—not when he is minded to exercise the powers given to him by the Act—but when he is "intending to make a sale, exchange, partition, lease, mortgage, or charge," and this, to my mind, means a particular sale, exchange, partition, lease, mortgage, or charge contemplated at the time when the notice is given. It may be said what is the meaning of that? My answer is, if the tenant for life intends to make a sale by auction it is as simple a thing as well can be. He can give a notice that on such a day, at such a

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time, and at such a place, he intends to put up for sale either a particular part or the whole of the estate called *Blackacre*, and either altogether or in lots. If he intends to sell a particular estate or part of it by private contract he can say so. In either case he would be giving notice of a specific intention to sell the whole or part of a particular estate in a specific way. In the same way, if he intends to make a lease of a particular 100 acres of land nothing can be easier than to give a notice of his intention to let that particular 100 acres. In the present case the notice does not relate to any particular part of the settled estates as intended to be either sold or leased, but it is a notice of an intention to sell or lease the whole or any part of the estates "as and when a proper opportunity shall from time to time occur." I cannot imagine that it was the intention of the section to authorize a general notice like this of an intention to sell or lease the whole or any part of the settled estate, without in any way specifying what part or parts are intended to be sold or leased, and I am further confirmed in this view by the words at the end of the 1st sub-section, "not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same." A contract for what? For the sale or lease of the whole or some specific part of the estate, as the case may be,—not a contract which is completely indefinite—but a contract for "the" sale or lease, *i.e.*, the sale or lease which has been already mentioned, the particular sale or the particular lease. If I were to hold that a merely general notice like this is sufficient, the result will be that every tenant for life, immediately on becoming entitled in possession, may give such a notice to the trustees of his settlement, and may then sell the whole or any part of the settled estates at any time during his life without being bound to give any further notice. If this be so, the appointment of trustees under the Act, and the provision of sect. 45 that "at the date of notice given the number of trustees shall not be less than two," is an entire delusion. I cannot imagine that the Legislature, when they provided by sect. 38 for the appointment of trustees for the purposes of the Act, and by sect. 45 that the tenant for life shall give notice to the trustees when he is intending to make a sale or lease, meant that a

general notice of an intention to sell or lease, at some time, given by the tenant for life to the trustees the day after he comes into possession of the estate, should be a good and effectual notice, it may be, for forty years to come. I am still further confirmed in the view which I have expressed by the decision of the Court of Appeal in *In re Kemp's Settled Estates* (1), in which it was held that the solicitor of the tenant for life is not a proper person to be appointed a trustee for the purposes of the Act, simply on the ground of his connection with the tenant for life. Lord Justice *Cotton*, who delivered the judgment of the Court, said (2): "The appointment of trustees is required to impose a check upon the extensive powers conferred by the Act upon the tenant for life, and the 44th section contemplates the probability of there being differences between the trustees and the tenant for life."

For this purpose a notice such as that which has been given in the present case would be nugatory; you might as well put into the post a notice addressed to no one, which would be returned to you through the Dead Letter Office. I am of opinion that this notice is not a good one under sect. 45, and I must make a declaration in the terms of the summons. The committee must pay the costs of the summons, but this will be without prejudice to any application by him in the Lunacy to be allowed those costs.

Solicitors for Trustees: *Wynne & Son.*
Solicitors for Committee: *Blunt, Tebbs, & Lawford.*

(1) 24 Ch. D. 485. (2) 24 Ch. D. 487.

W. L. C.

C. A.
1883
Nov. 22, 24.

COOPER *v.* METROPOLITAN BOARD OF WORKS.

[1882 C. 1670.]

Lands Clauses Act—Special Agreement—Compensation—Occupier of House—Title—Metropolitan Streets Improvement Act, 1877—*Personal Goodwill of Business—Mortgage—Evidence—Report of Surveyor.*

A public body acting under the powers of their Act and of the *Lands Clauses Consolidation Act* gave notice to the Plaintiff, who was a tailor, to take his house, which was leasehold. After some negotiation they offered him £400, of which £150 was to be apportioned to his leasehold interest and £250 to his trade damage and personal expenses, to which the Plaintiff agreed. The Plaintiff had mortgaged his leasehold interest and could not make a good title. The Plaintiff then brought an action for specific performance of the agreement, and the Defendants afterwards paid the £400 into Court under the 76th section of the *Lands Clauses Act*, executed a deed-poll, and took possession:—

Held (affirming the decree of *Bacon*, V.C.), that the Plaintiff was entitled to judgment in the action, and to have the £250 paid at once to him, with interest from the time when the Defendants took possession.

Although in some cases the goodwill of trade premises passes to a mortgagee, that does not apply to a case where the goodwill depends on the personal skill of the owner.

A public body passed a resolution directing their solicitor to write a letter to the Plaintiff, the resolution being based upon the report of their own surveyor. The Plaintiff wished to put the report in evidence to shew the grounds for passing the resolution, and to explain the latter:—

Held, that the report was not admissible.

THE Plaintiff was a tailor occupying a house in *Kentish Town Road*, under a lease of which about eight years were unexpired, at a rent of £30.

In the month of September, 1880, the Defendants, the Metropolitan Board of Works, acting under the *Metropolitan Streets Improvement Act*, 1877 (40 & 41 Vict. c. ccxxxv.) with which the *Lands Clauses Consolidation Act* was incorporated, gave notice to the Plaintiff to treat for the purchase of his interest in the premises.

By the 23rd section of the Defendants' Act it was provided that the jury or arbitrator to whom any question of compensation should be referred should award all determinations, judgments, and verdicts which they should make and give concerning the

value of lands, or any share, estate, or interest therein, or charge thereon, separately and distinctly from the consideration of any other loss to which the occupier might personally be entitled, or any loss or damage to be sustained by any person in consequence of the execution of any of the powers of the Act, and should distinguish the value set upon the land or share, estate, or interest therein or charge thereon, and the money assessed or adjudged for such loss or damage as aforesaid separately and apart from each other.

The Plaintiff sent in a claim for £655, made up as follows:—

	£
Value of the lease . .	255
Damage to trade . . .	300
Cost of removal . . .	50
Fixtures	50
	£655

In January, 1881, the Defendants served notice on the Plaintiff of their intention to summon a jury, and offered him £330.

After some correspondence the solicitor for the Defendants wrote a letter to the solicitor for the Plaintiff, dated the 15th of March, 1881, offering £400 in full discharge of all claims by the Plaintiff.

To this the Plaintiff's solicitor replied on the 21st of March as follows:—

"I am willing to accept the £400 offered in yours of the 15th, provided that the leasehold interest is assessed at £150. My reason is that we have some difficulty in giving you a proper assignment and you may have to pay the money into Court. I, however, do not want it to prejudice my client's personal compensation, and as it may never reach him I am inclined not to insist on what I should think was the full value."

On the 22nd of March the solicitor for the Board wrote that the Board declined at first to consent to a division of the compensation, and on the 26th of March the Plaintiff's solicitor wrote again as follows:—

"I am sure we shall never come to terms, so the sooner you

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lodge the warrant the better, but I hereby give you notice that the claim for the leasehold interest is on behalf of himself and his mortgagees."

On the 27th of April the Defendants' solicitor wrote a letter in the following terms:—

"Referring to your letter of the 21st ult., I have brought the matter again before the Board, and I am instructed to inform you that if your client will accept £400 in settlement the Board will consent to apportion £150 to the leasehold interest and £250 to the trade damage and other items of claim."

To this offer the Plaintiff's solicitor agreed in a letter dated the 28th of April.

On the 22nd of July, 1881, the Defendants' solicitor made application for an abstract of the Plaintiff's title, to which the Plaintiff's solicitor replied that there could be no abstract, as his lease was not forthcoming; and asked that the sum of £150 might be paid into a bank and the remaining £250 paid to the Plaintiff.

The Defendants having declined to adopt this course, the Plaintiff on the 15th of May, 1882, brought the present action against the Board claiming specific performance of the agreement contained in the letters before referred to.

In answer to interrogatories sworn in the action on the 27th of May, 1882, the Plaintiff stated that he had assigned his lease by way of mortgage to *S. Eastcourt* in 1867, that he did not know how much was due on the mortgage, and that *Eastcourt* left *England* in 1869 and had not since been heard of.

On the 19th of July, 1882, the Defendants paid the £400 into Court under the 76th section of the *Lands Clauses Act*, and took possession of the house, which had been vacated, the Plaintiff having taken a new house on the 24th of June, 1881. The money was paid to "the account of *J. Cooper, S. Eastcourt*, and all other persons interested in the premises."

On the 4th of August, 1882, the Board executed a deed-poll under the 77th section of the *Lands Clauses Act* by which the house became vested in them.

Vice-Chancellor *Bacon*, before whom the action was tried, gave

judgment for specific performance of the agreement, and held that the Defendants had accepted the title to the house; and he ordered £250 to be at once paid to the Plaintiff with interest at 5 per cent. from the day on which the Defendants took possession.

From this judgment the Defendants appealed.

Marten, Q.C., and *Methold*, for the Appellants:—

The Plaintiff cannot recover in this action without shewing a good title to the leasehold premises; and this he has not done and cannot do. We never accepted the title, but we paid the money into Court because the Plaintiff could not make a good title. The whole negotiation referred only to the amount of compensation, and was on the supposition that the house belonged to the Plaintiff. If it does not, he is not entitled to any compensation in respect of his occupation or goodwill, and the agreement falls to the ground. The goodwill does not belong to him but to his mortgagee, or at all events, must be apportioned between them: *Chissum* v. *Dewes* (1); *King* v. *Midland Railway Company* (2); *Pile* v. *Pile* (3). If, therefore, we pay this money to the Plaintiff we may have to pay compensation also to the mortgagee, who is not bound by the Plaintiff's agreement.

Hemming, Q.C., and *C. H. Turner*, for the Plaintiff:—

The Plaintiff claims under a special agreement, which is independent of the *Lands Clauses Act*. The Defendants knew at the time that the house was mortgaged, and that it was doubtful whether the Plaintiff could make a title. We deny that the goodwill of the Plaintiff's business would pass to the mortgagee with his house; but whether it did or not we rely upon the special contract with the Defendants. The Defendants knew the state of the title, and that was the reason why they consented to the apportionment. This is made clear from the report of their surveyor upon which the resolution of the Board consenting to the apportionment was based.

Methold objected to the report of the surveyor being admitted as evidence. It was a privileged communication. The resolu-

(1) 5 Russ. 29. (2) 17 W. R. 113.

(3) 3 Ch. D. 36.

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tion is evidence, but not the confidential report of their agent on which it was based.

Hemming, Q.C.:—The object of putting in the report is to explain the letter of the 27th of April and shew its connection with the resolution, which constitutes the instructions referred to in it. The surveyor does not advise the Board like the solicitor, he is merely their servant, and what he does is their act.

LINDLEY, L.J.:—I think the report is not admissible on the ground of privilege.

FRY, L.J.:—If the report can be received it must either be as an admission on the part of the Board or as evidence. It is not an admission, because it does not contain any statement of the facts which are said to be admitted. It is not evidence; for if it were, it would be evidence not only for the Plaintiff but against him; and it would be very hard that he should be bound by statements in a report which he had never seen.

COTTON, L.J.:—In my opinion the grounds for rejecting the report are these. It is an attempt to construe the letter by shewing the instructions to the solicitor to write it. It is no evidence of the truth of the matters stated in the report. The authorization of the agent to act on the report is not evidence of the truth of the matters contained in the report. It only authorizes the agent to act on them as if they were true.

Marten, in reply.

COTTON, L.J.:—

This is an appeal from a judgment of Vice-Chancellor *Bacon*, which he gave in favour of the Plaintiff against the Metropolitan Board of Works. The Plaintiff is the occupier of a house which the Metropolitan Board of Works took. His title was leasehold and he carried on business there. Some correspondence took place between the solicitor of the Plaintiff and the solicitor of the Board with reference to the amount of compensation to be paid to him. In the first instance he sent in his claim for £655,

stating the items of which that was composed, damage to trade, cost of removal, so much for fixtures, and so much for the value of the lease. On the 15th of March, 1881, there was an offer made on behalf of the Board to give £400 in full discharge of his claim and a certain allowance for costs.

On the 21st of March the Plaintiffs' solicitor wrote as follows, "I am willing to accept the £400 offered in yours of the 15th, provided that the leasehold interest is assessed at £150. My reason is that we have some difficulty about giving you a proper assignment, and you may have to pay the money into Court." That to my mind clearly means the money which he had already referred to as the value of the leasehold interest, "I, however, do not want it to prejudice my client's personal compensation, and as it may never reach him I am inclined not to insist on what I should think was the full value." That means, in my opinion, "I will take the £150, although that may not be the full value. It may have to go into Court and my client may not get it, but I do not want it to prejudice my client's personal compensation." I think up to that time there had been no dealing on the footing that there was anything besides the ordinary agreement as to the price to be paid for the value of the whole interest to be taken; but here, in my opinion, the Plaintiff's solicitor lays down distinctly the difference between what was to be paid for the value of the leasehold interest, that is, the value of the land to be taken, and what he calls his client's personal compensation, that which he contemplates would come to him directly, and what in consequence of any failure of title or any inability to satisfy the Board as to the title would have to be paid into Court.

Then the Board on the 22nd of March say, through their solicitor, "The Board cannot consent to a division of the compensation as you propose." Now to my mind that shews that the Board understood what the Plaintiff's solicitor meant—they say, "We cannot agree to fix the £150 as the value of that which represents the leasehold interest, and which depends on your title, and take the remainder as something that is not dependent on your title." Then comes a letter of the 26th of March on which I think the Board have put a wrong construction. Mr. *Webster*,

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who is the Plaintiff's solicitor, says, "We shall never come to terms, but I hereby give you notice that the claim for the leasehold interest is on behalf of himself and his mortgagees." It was said that that was a representation that he was authorized to act for the mortgagees. It clearly explains what was the difficulty as to the Plaintiff getting the money to be paid for the leasehold interest, but I do not read it as representing that Mr. *Webster* was authorized to represent and bind the mortgagees. It simply says, and I think it to some extent assists the contention of the Plaintiff, that by "the leasehold interest" was meant that which was comprised in the mortgage, and which the mortgagee, and therefore the Plaintiff, was interested in, that was a claim in respect of the interest of the Plaintiff and his mortgagee. Now we come to a letter which is the final acceptance and makes the contract; it is a letter by the solicitor to the Board, "Referring to your letter of the 21st ult., I have brought this matter again before the Board, and I am instructed to inform you that if your client will accept £400 in settlement the Board will consent to apportion £150 to the leasehold interest, and £250 to the trade damage and other items of claim." Now that, in my opinion, not only has a distinct reference to the letter of the 21st of March, but it is meant to be an acceptance of the terms there offered, namely, fixing £150 as the value of the leasehold, that which the letter of the 26th of March refers to as a matter in which the mortgagee and the Plaintiff are jointly interested, and £250 is to be the personal compensation which is referred to in that letter of the 21st of March. That is the construction I should have arrived at on these letters, and that is certainly accepted if it were necessary by the next letter. That construction is I think somewhat emphasised by the Act to which we are referred, and under which the Metropolitan Board of Works was then acting, namely, the *Metropolitan Streets Improvement Act*, 1877, 40 & 41 Vict. c. ccxxxv., because that says in the 23rd section, "The jury or arbitrator to whom any question of compensation under this Act is referred shall award all determinations, judgments, and verdicts which they shall make and give concerning the value of lands, or any share, estate or interest therein, or charge thereon, separately and distinctly from the consideration of any other loss to which the

occupier may personally be entitled, or any loss or damage to be sustained by any person in consequence of the execution of any of the powers of this Act." So we see that this Act contemplates that there shall be a claim to be assessed by the jury of that which independently of the value of the land, and independently therefore of the title to the land, the occupier—not the owner—may personally be entitled to in respect of any loss which he may have sustained. That I think shews how these letters were written, and what the Board must have understood them to refer to.

Then, as that is so, there is £150 for the leasehold, by which I mean everything comprised in the mortgage, and £250 is the personal compensation to the Plaintiff not as the owner but as the occupier in possession, and what he is personally entitled to. The doubt in my mind was whether that letter of the 27th of April introduced something new by adding £250 for the trade damage and other items—whether that could be considered as all payable in respect of the personal compensation. But looking to the letter of the 21st of March, and the way in which the letter of the 27th of April really refers to that, I think it must be considered as dividing the £400 in accordance with the offer and proposition made in that letter of the 21st of March, and saying "We give the £150 in respect of that which you and the mortgagee are entitled to, namely, that which he can claim in respect of the leasehold interest mortgaged to him and the £250 as your client's personal compensation." That is consistent with what we find here. But it was said that the £250 was to cover the goodwill, and that the mortgagee is entitled to that. But really "goodwill" is a word of which few people understand the meaning. It is obvious that there are certain kinds of goodwill to which a mortgagee will be entitled. The goodwill which attaches to a particular house increases the value of that house, and therefore the mortgagee is entitled to that. If, for instance, there is a well-known public-house, and, from its position being well-known, people frequent it, the goodwill attaches to the house and adds to its value. But there may be other kinds of goodwill attaching to personal reputation which a man has made for himself. Of course that does not go

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to the mortgagee of the house, but is a thing personal to the man whose skill and whose name have acquired that goodwill.

Then there is another question. Ought we to order payment of the £250 to the Plaintiff till his title to the leasehold is made out? I think we ought. It is said that if he were a mere occupier he would not be entitled to compensation. I do not agree to that. A mere occupier is a person who would be entitled to what the Act calls "personal compensation," the inconvenience to him of being personally turned out is just the same whether he had a good title to the leasehold or not. If the occupier is not a person having a title to the leasehold interest claimed, and this money is to be paid into Court to wait the title being considered and made out, if someone else not in possession was entitled to the leasehold, he would not be entitled to this £250 which was not in respect of any interest in the house. I think we must construe this agreement as regards the £250 as made for the payment of that to the Plaintiff, independently of the question as to whether he was or was not entitled to the leasehold interest in respect of which the £150 was to be paid. Therefore, I think the Vice-Chancellor was right in his judgment as to the payment of £250 with interest from the day when the Metropolitan Board of Works took possession. I do not think it right to give interest from the time when the Plaintiff went out. It must be from the time when the Metropolitan Board of Works either took possession or claimed possession from him.

But then the Vice-Chancellor has found that the title has been accepted. Now as to that, I cannot find that there has been any acceptance of the title. That part of the judgment is I think erroneous.

The proper course will be to direct an inquiry as to the title, and as the house has been already vested in the Defendants, all proper parties will be at liberty to apply in chambers for the payment of the purchase-money. The form of inquiry will be, who is entitled to receive and give a receipt for the purchase-money. When the £250 is paid to the Plaintiff, the Metropolitan Board of Works will also be entitled to get out of Court what has been paid in under the *Lands Clauses Act*.

LINDLEY, L.J.:—

I will only add a few words. I think on the construction of the letter of the 27th of April, the view taken by Vice-Chancellor *Bacon* is correct. The way in which I have tried to work it out is this. Suppose the Plaintiff had brought an action at law for this £250, would there have been any defence to it? I confess I do not think there would. I think the action could never have been restrained by injunction, nor would there have been any defence sustainable. Let us first look at the Plaintiff's claim. In his claim he says that he claims as a leaseholder and also as an occupier. Then we have the letters which have been commented upon by the Lord Justice, and which I understand in the same sense as he does. We must construe those letters with reference to the claim, and with reference to the Act of Parliament under which the Metropolitan Board of Works takes this property. In the 23rd section it is important to observe that there is a sharp distinction drawn between compensation in respect of what I may call the value of the land, and compensation in respect of the loss to which the occupier is personally entitled. Bearing those circumstances in mind and looking at this correspondence as a whole, and scanning it narrowly, I am satisfied that the true construction of these letters is that the parties came to terms that £150 should be paid into Court or be retained to represent the leasehold interest, everything which would pass to the mortgagee, and that the balance, although it is called "other items of claim," and therefore might strictly include fixtures, was really meant and intended to be that which should be paid to the occupier in respect of the loss to which he was personally entitled under the 23rd section. I think that was the very thing the occupier's solicitor was claiming, and that was the understanding of those who acted for the Metropolitan Board of Works. That I think is the true construction of the agreement between them. When we arrive at that, it seems to me that there is no answer to the action. They have severed the two heads of compensation, and agreed to pay the Plaintiff for the personal loss. That is my view of the true construction of these documents, I quite agree that the title to the lease has not been accepted. In that respect in point of form perhaps the decree is hardly right, and it ought

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to be varied. The £250 ought to be paid with interest from the time when the Defendants took possession. Except as regards the title, I think the order ought to be affirmed.

FRY, L.J.:—

I have very few words to add. I am entirely of the opinion which has been expressed by my learned brothers, and I only desire to make this observation, that in coming to the conclusion which I have done I do not affirm that the £250 representing the trade damage and other items of claim may not, as to part of it, be property in which the mortgagee is interested, but I affirm that, whether it be so or not, the Board have undertaken and contracted to pay it in perfect independence of any inquiry as to his title. That is the view which I take of the result of the correspondence. That being my view, I entirely concur in the conclusion which has been arrived at.

Solicitors: *W. S. Webster; R. Ward.*

M. W.

C. A. 1883 KAY, J. *Nov.* 15. C. A. 1884 *Jan.* 14.

In re SAMPSON AND WALL, INFANTS.

[1876 W. 285.]

Infants Settlements Act (18 & 19 *Vict. c.* 43) [*Revised Ed. Statutes, vol. xii. p.* 468]—*Settlement "upon" Marriage—Ward of Court—Contempt—Form of Settlement—Power to enforce Settlement against Ward.*

A gentleman having, in wilful defiance of an order of the Court, married an infant ward of Court, the usual directions were given for a settlement of her property, and a settlement was prepared which provided that the power of testamentary appointment given to her in default of issue should not be exercised in favour of the husband. The wife objected to this exclusion of the husband, and to the proposed trustees, with whom she was not on friendly terms, and she refused to execute the settlement unless it was altered in these particulars. There was no objection to the trustees except her personal dislike to them. On an application in the matter of the infant and under the *Infants Settlements Act* (18 & 19 Vict. c. 43), *Kay*, J., made an order for the husband and wife to execute the settlement as it stood.

The wife appealed.

Held, by Earl of *Selborne*, L.C., and *Fry*, L.J. (*dubitante Cotton*, L.J.),

that under the Act 18 & 19 Vict. c. 43, a settlement of an infant's property may be made on the occasion of his or her marriage after the marriage has taken place.

Held, by *Cotton* and *Fry*, L.JJ. (*absente* Earl of *Selborne*, L.C.), that the wife ought not to be prevented from exercising in favour of her husband the power of testamentary appointment in default of issue, and that it was desirable not to appoint trustees with whom she was on unpleasant terms, and that the settlement ought to be modified in these respects; and the wife being willing to execute the settlement so modified, the Court declined to decide whether she could be compelled to execute it.

ON the 7th of August, 1876, an order was made in the matter of *Edward W. Wall* and *Fanny C. Wall*, infants, appointing Mr. *Barnaby* and their mother, Mrs. *Wall*, their guardians, and allowing £700 a year for their maintenance out of property to which they were entitled under two wills.

In 1883 Captain *Sampson* paid his addresses to Miss *Wall* with the consent of her mother. On the 20th of June, 1883, an order was made in the matter, on the application of Mr. *Barnaby*, restraining Captain *Sampson* from marrying Miss *Wall*, and from all communication with her, the objections taken to his suit being that he was a Roman Catholic of the age of forty, she a Protestant, of a Protestant family, and of the age of nineteen. On the following day Captain *Sampson* and Miss *Wall* eloped and were married at a register office.

On the 18th of July an order was made for the committal of Captain *Sampson* to *Holloway Prison*, where he was to remain until further order. An inquiry was directed as to the validity of the marriage, and in case it should appear that the marriage was valid, then it was ordered that a proper settlement, to be approved by the Judge, of the lady's fortune, should be settled. Shortly after the date of this order Captain *Sampson* was committed to prison.

A settlement was accordingly prepared declaring the trusts of the lady's fortune to be for her for her life, and after her decease for the issue of the marriage as she should by deed or will appoint, and in default of appointment for such children or child of the marriage as being sons should attain twenty-one, or being daughters attain that age or marry, and if more than one in equal shares, and in default of issue, then if the wife survived the

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husband, in trust for her absolutely, but if she should die in his lifetime, then "upon such trusts and subject to such provisions and declarations and in such manner in all respects, *not being for the benefit of the said George D. Sampson*, as the said *Fanny C. Sampson* shall notwithstanding coverture by will or codicil appoint," and in default of appointment upon the usual trust for the persons who under the Statutes of Distribution would have become entitled thereto at her death if she had died possessed thereof intestate and without ever having been married.

Mrs. *Sampson* objected to the settlement on the ground that it precluded her from making a will in favour of her husband in default of issue. She also objected to the proposed trustees, alleging not that they were unfit persons, but that she was not on friendly terms with them.

An application by Captain *Sampson* that he might be discharged from custody came before Mr. Justice *Kay*, on the 15th of November, 1883, along with an application by the wife to vary the settlement.

Robinson, Q.C., and *Stallard*, for Captain *Sampson*, produced an affidavit by him in which he expressed sorrow and regret for his conduct, and humble submission to the Court; and also affidavits from two medical practitioners in which they stated in effect that they had examined the Captain, found that his health was bad and that further incarceration would seriously impair it and might produce conditions of a dangerous character; and a hope was expressed that under all the circumstances of the case the Court would consider that he had been by his confinement since the 18th of July, 1883, sufficiently punished for his contempt of Court.

Rigby, Q.C. (with him *Stallard*), for Mrs. *Sampson*, submitted that what the Court always looked at in making a settlement was the interest of the ward whose property was settled, and not the punishment of the husband. The settlement, which had been prepared by the conveyancing counsel, proposed to exclude altogether the husband, and it even went so far as to prevent the wife

from having any power of appointment by will in default of issue in favour of her husband, whereas the usual form was to give the wife a general power of appointment by will, and the case of *Field* v. *Moore* (1) was the only one against the course; but that was one of an aggravated and exceptional character. It was entirely outside the practice of the Court to punish a ward of Court; and such a thing as treating her as being in contempt, or exercising a jurisdiction which would be to her prejudice, was not known in this division of the Court. Mrs. *Sampson* objected to the settlement as framed, as what was proposed was not to give something to the husband, but by way of penal consequences to prevent any appointment by her by will in his favour, and it was not within the province of the Court to go so far as that. Mrs. *Sampson* also objected to one of the proposed trustees, and he should not be forced upon her. Her objections were well founded and should be allowed.

They referred to the cases of *Birkett* v. *Hibbert* (2) and *Millet* v. *Rowse* (3).

Hastings, Q.C., and *Byrne*, for the guardians, submitted that the Court had power, under the statute 18 & 19 Vict. c. 43, to make the settlement proposed for the ward, and to direct her to execute it.

They referred to *Simpson* on Infants (4); and an affidavit made by the medical officer at *Holloway Prison* was produced, which was to the effect that the health of Captain *Sampson* had not suffered from the incarceration there.

The further facts and arguments are referred to in the judgment of Mr. Justice *Kay*.

KAY, J.:—

I wish to express my opinion fully upon this matter, because it involves a very serious question, in regard to which I do not find any other distinct decision than the case which I shall mention.

(1) 19 Beav. 176, and on appeal, 7 D. M. & G. 691.
(2) 3 My. & K. 227.
(3) 7 Ves. 419.
(4) Page 316.

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I will not refer to the facts of the case more than necessary for my purpose. In this case a young lady under age, a ward of Court, entitled to considerable property, which I understand will produce an income of somewhere about £2000 a year, was living with her mother, one of her guardians. The gentleman now her husband is a man of mature age, being, as I am informed, over forty years of age. He holds a commission in Her Majesty's army, and therefore is, I assume, a gentleman of intelligence and education, occupying a good position in society. He has some means of his own, but he does not propose to make any settlement of them. The young lady has been brought up as a Protestant and this gentleman is a Roman Catholic. While she was a ward of Court he paid attentions to her, which one of the guardians brought to the notice of the Court, and the Court made an order which, whether right or wrong, was made to prevent any access or communication between this gentleman and the ward of Court. Of course it was quite open to anybody to apply to the Court to have the order rescinded or varied on appeal, and the Court could have dealt with it in any way it liked. No such application was made: but with notice of the order, and I am satisfied with full knowledge of it, this gentleman, directly after the order was communicated to him, induced the ward of Court to go before a registrar and make a secret marriage with him. He then took her away and concealed their residence, and it was not until after application was made to commit his brother, who was aware of the residence, that he surrendered himself to the jurisdiction of the Court. There may possibly be a more flagrant contempt of Court than that committed, but it is difficult to me to conceive it. The jurisdiction which the Court exercises in protecting wards of Court, is one of the most difficult, painful, and disagreeable which a Judge can possibly be called upon to put in force. To my mind it is absolutely necessary that that jurisdiction should be respected by all persons, and one mode of making it respected, one mode of punishing those who commit flagrant violations of the orders of the Court in this respect, and are guilty of gross contempt, is to let it be thoroughly understood that under no possible circumstances in which the Court can prevent it shall the person who has committed the

contempt take any interest in the property of the ward. That in my opinion is a most salutary rule, and, without meaning the observation to apply to this gentleman particularly, it seems to me most important that an adventurer who will induce a ward of Court to elope with him, in defiance of a positive order of the Court that he shall hold no communication with the ward, should at least know that the absolute rule of the Court is that which I have mentioned.

This is a case in which it seems to me the settlement which I am bound to direct to be executed shall be in as strict a form as it is possible for the Court to adopt, and one authority for a settlement which was directed by the Court, and which excluded the husband from taking any possible interest, even under a power of appointment in default of issue, given to the wife, is the case of *Field* v. *Moore* (1). The form of the settlement is stated on pp. 190, 191, and the ultimate trust in default of issue was "subject to such further provisoes, agreements and declarations not being for the benefit of the said *Samuel Brown*"—the husband—" as she the said *Esther Brown* shall, whether covert or sole, by her last will and testament in writing, or any codicil or codicils thereto, direct or appoint." That form, until corrected by higher authority, I think it to be my duty to follow in this case, and accordingly I direct that the settlement to be now made shall exclude the husband in those terms from any interest that the wife could otherwise give him by will. I have given my reasons for thinking it is the duty of the Court to make people understand that this is a form of settlement which has been approved by the Court before, and which it is now thought right to follow. I have before me two questions, one the form of settlement, which I have answered in the manner mentioned. The other is a question concerning the trustees of the settlement, and I accede to the objection made on behalf of the wife. I suggested, and the suggestion was immediately adopted, that some other person than the solicitor employed by the guardians in this matter be appointed one of the trustees. I can quite conceive a feeling, right or wrong, which may make it unpleasant for him to act and unpleasant for the other parties

(1) 19 Beav. 176.

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interested in the settlement that he should act. Accordingly I think that, together with the other two trustees, the objection to whom I do not think sustainable, there should be some other proper person appointed trustee of the settlement whose fitness must be verified in the usual way. That being so, I now order the wife to execute the settlement, and it is necessary I should do this, because I am told the property really belongs, under 45 & 46 Vict. c. 75, s. 2, to her for her separate use. She is an infant, but under the *Infants Settlements Act* (18 & 19 Vict. c. 43), it has been determined in *Powell* v. *Oakley* (1) that the power thereby given extends in the case of a ward of Court to a settlement made after the marriage has been actually solemnized. Accordingly she, though an infant, has power to make a settlement of this property, although the marriage has actually been solemnized, and I, following that case, order her to execute the settlement.

The other application is that the husband may be released from prison. He was committed for his contempt of Court in July last, and he has ever since been in prison. I am told that applications were made to the Vacation Judge to release him which were not complied with. It was said it will be of no use for him to execute the settlement, but I am not persuaded of that. It may be necessary to insist that he shall execute the settlement in a contingency which I will not contemplate at present as being possible. I cannot consider that his contempt has been purged at present, and therefore I do not think it right to release him. I have read carefully the evidence concerning his health, and I have no doubt that that of the medical officer of the prison where he is is thoroughly reliable. It satisfies me that no injury to his health is being occasioned by the imprisonment. I hope the parties will be well advised, and then there will be no difficulty in renewing the application for release from custody; but at present my order is that this part of the application do stand over generally, with liberty to apply.

T. F. M.

C. A.

Mrs. *Sampson* appealed, and the appeal was heard on the 14th of January, 1884.

(1) 34 Beav. 575.

Rigby, Q.C., and *Stallard*, for Mrs. *Sampson*:—

We contend that a valid settlement cannot now be made, for that the *Infants Settlements Act* (18 & 19 Vict. c. 43) does not apply after marriage. Lord *Romilly*, in *Powell* v. *Oakley* (1), intimated an opinion that it did, but he did not really decide the point. In the case of *In re Potter* (2) Vice-Chancellor *Malins* held that there was no power after marriage to approve a settlement unless the infant was a ward of Court; but whether the infant was a ward of Court or not cannot affect the construction of the Act. The reference to a guardian in the Act shews that in the case of a female the Act is referring to one who in the ordinary course of things might have a guardian, *i.e.*, an unmarried female. The 4th section also confirms the more restricted construction, and shews that marriage is the period to be looked to.

Now, as to the objections to the form of the settlement, supposing the Court can order it. In *Attorney-General* v. *Clements* (3) the wife was precluded from appointing by will to the husband but in *Attorney-General* v. *Read* (4) it was shortly afterwards decided by the same Judge, following *Attorney-General* v. *Lucas* (5), that there ought to be no such exclusion of the husband. In *Field* v. *Moore* (6) it incidentally appears that there was a similar exclusion of the husband from the power of appointment, but it does not appear whether the point had been discussed. In *Wade* v. *Scruton* (7) there was no such exclusion. The Court will look to the interest of the ward more than to the punishment of the husband, and it is not for her interest that her married life should be made uncomfortable by a provision of this kind, which will tend to produce ill-feeling. The observations of Lord *St. Leonards* in *Re Murray* (8) are material on this head. In *Millet* v. *Rowse* (9) and *Bathurst* v. *Murray* (10) Lord *Eldon* held that the wife ought to have the power of appointing to the husband in default of issue. The present case is a bad one as regards deliberate and wilful contempt of the Court, but not in any other respect. As to the

(1) 34 Beav. 575.
(2) Law Rep. 7 Eq. 484.
(3) Ibid. 12 Eq. 32.
(4) Ibid. 12 Eq. 38.
(5) 2 Ph. 753.
(6) 7 D. M. & G. 691.
(7) 4 Cl. & F. 378, n.
(8) 3 D. & War. 83.
(9) 7 Ves. 419.
(10) 8 Ves. 74.

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trustees proposed, there is no imputation of any kind against them; but the wife is not on friendly terms with them, and objects to having them as her trustees. If trustees whom she approves are appointed, and the settlement is modified as we have stated, she is willing to execute it if the Act applies.

Hastings, Q.C., and *Byrne*, for the guardian:—

Apart from the *Infants Settlements Act* the Court could not order the infant to execute a settlement, because the infant would have no power to execute one; but if the infant has power the Court can compel her to exercise it. We contend that under the Act she has that power. "Upon" in its most strict sense means at the instant of the marriage, but that cannot possibly be what was intended; it must mean about the time of the marriage, and on the occasion and in consequence of it.

[COTTON, L.J.:—We will hear one counsel on each side on that point when the Lord Chancellor comes in.]

We assume, then, that the infant has the power, and urge that in that case the Court can make the order against its ward.

[*Rigby*:—There is no case of committing a ward for not executing a settlement.

FRY, L.J.:—I think it has been done.]

It has been said by the Court over and over again that it can make orders against its wards, and if it can make them it must have the power of enforcing them in the usual way. *Martin* v. *Foster* (1) favours that view.

[COTTON, L.J.:—The fund was there in Court, and the Court decided that it should not be paid out unless a settlement was made, but appears to have declined to decide whether it could force a settlement on the parties.]

If, in the present state of the law, the property now being the wife's separate estate, she can refuse to execute a settlement, a great temptation will be held out to adventurers.

As to the exclusion of the husband, the Judge said that as the contempt was gross he would exclude the husband as far as

(1) 7 D. M. & G. 98.

the authorities allowed, and he followed the form in *Field* v. *Moore* (1).

Robinson, Q.C., and *McClymont*, appeared for the husband.

EARL OF SELBORNE, L.C., having entered the Court, the argument on the *Infants Settlements Act* was resumed.

Rigby, Q.C., for the wife:—

The common understanding of "upon" is on the day of the marriage or the day before, and the language of the 3rd section as to guardians naturally points to an unmarried infant.

[EARL OF SELBORNE, L.C.:—If the infant has a guardian, does he cease to be such on her marriage?]

The point does not appear ever to have been decided, but it is the general understanding that his authority ceases on her marriage.

[EARL OF SELBORNE, L.C.:—You admit that there is no authority; do the text books lay down the law as you say?]

Simpson on Infants (2) supports my view. The case appears, however, mainly to turn on the words "upon or in contemplation of," and if the intention had been to authorize a settlement after marriage that intention would have been expressed more plainly. The 4th clause must be read as applying to infants who marry under the ages there specified, and if the line is drawn at marriage for the purpose of determining whether the Act applies, it must be considered that it is there drawn for all purposes, and that the Act does not apply after marriage. Moreover, if post-nuptial settlements were in contemplation, there is no imaginable reason why the Court should not have power to sanction them, however young the parties were.

Hastings, Q.C., *contrà*:—

Unless it would unreasonably strain the words "upon or in contemplation of" to apply them to a settlement made about the time of the marriage and in consequence of it, though not executed till after the marriage had taken place, that construc-

(1) 19 Beav. 176, 191. (2) Page 204.

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tion ought to be adopted as being most fitted to carry out the intention of the Act as shewn by its preamble. Upon marriage means "in the event of marriage."

[EARL OF SELBORNE, L.C.:—I should prefer saying "on the occasion of" the marriage.]

That, I submit, is the true view, and the only point urged against me is the machinery of the 3rd section.

[EARL OF SELBORNE, L.C.:—We do not desire to hear you on that.]

The view of Lord *Romilly* in *Powell* v. *Oakley* (1) has been acted upon repeatedly, and it would be a very serious matter if all the settlements thus made were now to be held invalid. The object of the 4th section appears to be to discourage unreasonably early marriages by not allowing the parties to make an ante-nuptial settlement before a certain age, and the inference to be drawn from it as to the construction of sect. 1 is too uncertain to be relied on.

EARL OF SELBORNE, L.C.:—

To the best of my judgment the words of the Act 18 & 19 Vict. c. 43, s. 1, are wide enough to include a settlement upon occasion of marriage, though made after the marriage, whether the infant be a male or a female infant. If that be the reasonable construction of the 1st section taken by itself, I cannot think that there is any inference to be drawn either from the 3rd or from the 4th section sufficiently strong to vary it. Now is that the reasonable construction or not? Of course if there are words in the 1st section which according to their proper and reasonable interpretation exclude that construction *cadit quæstio*. If there are not, it strikes me that there is very great force in the considerations urged in favour of giving the enactment the more extended operation.

This is not an enactment having any special reference to wards of Court or to contempts of Court, and the case may easily happen of its being desirable that a settlement should be made

(1) 34 Beav. 575.

in a case of infancy, when a marriage had taken place under circumstances which would prevent any exercise of forethought either by the Court or by other persons before it had taken place. Two infants or an infant and an adult might contract a clandestine marriage without the knowledge of their friends, and might afterwards by the interposition of friends, perhaps by their assistance, by offers on their part to contribute towards a proper settlement, be led to be desirous of making such a settlement as wise friends would have suggested before the marriage. That is certainly not a case unlikely to happen, nor a case which it might not be advisable to provide for by such means as we find in this Act. I think it would have been an oversight on the part of the Legislature if, in an Act to enable infants on marriage to make reasonable settlements with the sanction of the Court of Chancery, it had excluded the case of a marriage improvidently contracted before or without a settlement. I do not say that these considerations could be allowed to overweigh a just construction of the words of the clause, but I think they are entitled to as much weight in the one direction, as any inferences from the 3rd and 4th sections can possibly have in the opposite direction.

Then, looking to the words of the 1st section, I am struck by two things: first of all the words are "upon or in contemplation of his or her marriage." Are the words "or in contemplation" simply expository of the word "upon," or is the disjunctive word "or" to have its natural effect? If we hold that two distinct things are in view, a settlement in contemplation of marriage, or, in other words, an ante-nuptial settlement, and a settlement which though not in contemplation of marriage is nevertheless in a just and true sense a settlement upon marriage, that gives the word "or" its proper disjunctive sense, and must make the word "upon," as distinct from the words "in contemplation of," applicable to a post-nuptial settlement on the occasion of and arising out of the particular marriage. It is suggested that there may be another explanation of the words "or in contemplation of," viz., that there may be a marriage contemplated, and as long as it is in contemplation it may be convenient and reasonable to make a settlement in view of it, but that the marriage may go

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off. Of those two views, the former appears to me to be the more consistent with the object and the language of the clause, because what it says may be done with the sanction of the Court upon or in contemplation of the infant's marriage, is to make a valid and binding settlement or contract. Those words "valid and binding" would, as it seems to me, be inapplicable and inappropriate if the treaty for a marriage which went off and never resulted in a marriage were supposed to have been thought of by the Legislature when it used the words "or in contemplation." Therefore, I do not think that the words "in contemplation" were used with any reference to a treaty which might come to nothing. I think then that if the disjunctive word is to have force, it must have effect given to it by making the clause coextensive with the convenience, reason, and necessity of the case, and applicable to a settlement upon the occasion of the marriage, though from accidental circumstances it may not be made until after the marriage has taken place.

There is another part of the clause which confirms me in this view; it says that it shall be lawful for the infant to make a valid and binding "settlement or contract for a settlement." A binding contract for a settlement may therefore be made under this clause, and I assume that this means an ante-nuptial contract; and as the case of a contract is separately dealt with, I think I am bound also to assume that the Legislature contemplated the possibility of nothing more being done before marriage than the contract for a settlement as distinct from the settlement itself. But what a strange thing it would be if the Legislature enabled that to be done, and then held its hand and left the parties, after marriage, unable during the continuance of the infancy to make the actual settlement pursuant to that contract. The larger construction would enable the ante-nuptial agreement to be carried into effect after the marriage by an actual settlement, without waiting for the determination of the infancy. It is very desirable that the contract when made should be carried into effect as soon as possible, more especially as questions of conveyancing might sometimes arise as to the proper mode of carrying it into effect. These considerations of convenience, expediency, and policy may, it appears to me, be

legitimately taken into account. Express authority upon the subject there is none, but a judicial opinion or inclination of opinion in this direction was expressed in *Powell* v. *Oakley* (1), and that seems to have been followed, although apparently without argument, in some cases that have been mentioned, and as I judge from *Seton* on Decrees, perhaps in others which have not been mentioned. I should not at all think the Court bound by such a state of authority if I saw any clear reason for coming to a contrary conclusion; but I do not. I think it ought to be disregarded, as the matter actually stands. All the Court are of opinion that the reference to a guardian in the 3rd clause may be dismissed from consideration. No doubt it may be, and is, a question whether the 4th clause does not exclude all cases where a male marries under the age of twenty, or a female under the age of seventeen. If that be its meaning, then it apparently follows that the line is to be drawn at marriage, at least for the purpose of ascertaining whether the Act applies. The inference suggested is, that the line ought to be drawn there for all purposes. I can only say that this inference seems to me to be too uncertain to have weight on the present occasion. The effect of that clause is not now before the Court, and I do not think it would be wise to determine it until the question arises. It is possible on the one hand that the Court may think that an infant marrying under the age there mentioned (the intention evidently having been to discourage such very early marriages) is not to have any benefit from the Act. On the other hand it is open to argument, that although until the age there mentioned is attained no benefit can be obtained from the Act, yet that the incapacity to make a settlement ceases after that age has been attained, and that then a settlement, if really and truly a settlement upon the occasion of the marriage and caused by the marriage, and considered by the Court to be desirable and proper, might be made. I do not think it necessary to express any opinion upon that point. All I do say is, that any inference from that clause seems to me to be insufficient to prevail against the considerations which lead me to take the larger view of the meaning of the 1st clause.

(1) 34 Beav. 575.

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COTTON, L.J.:—

The 4th section of the Act provides that it shall not extend to any case where the minor, if a male, is under the age of twenty, and if a female is under the age of seventeen. Now if the Act was intended to apply to post-nuptial settlements, I can see no reason why when the parties were married the Court should not have power to determine what would be a proper settlement, though they married at too early an age. This I think shews that Parliament was only contemplating ante-nuptial settlements, and desired that the parties should not be enabled to get the benefit of the Act when they were going to marry below the ages which Parliament thought right.

However, I quite agree that the question must turn on the construction of the words of the 1st section, having regard to the words of the next section. I believe that Lord Justice *Fry* agrees with the Lord Chancellor, and certainly the construction which they put on the Act is a very convenient one, but I must say that my doubts, whether on the proper construction of the words "upon or in contemplation of marriage" the Act is not confined to ante-nuptial settlements, are not removed.

FRY, L.J.:—

I agree with the Lord Chancellor that the Act enables settlements to be made upon the occasion of marriage either before or after the marriage has taken place. The Lord Chancellor has expressed the views which he entertains, and which I also entertain, with regard to the construction of the Act, so fully that I need say very little; and had it not been for the doubts expressed by the Lord Justice *Cotton*, I should probably have said nothing.

Referring to the preamble, it appears to me that it applies equally to the inconveniences and disadvantages which result from the incapacity of persons who marry during minority to execute settlements before or after marriage. The inconvenience arising from the incapacity of infants to make settlements is by no means confined to the incapacity to execute them before marriage. The preamble being in general words appears to me to apply to all those inconveniences.

Then when I look at the operative part of the Act, its terms

are wide enough to enable every infant to act in a certain manner, and it appears to me that its words should not be unnecessarily confined. The essential words are "upon or in contemplation of his or her marriage," and I feel myself bound to give, if I can, an ample meaning to each of the words which are separated from one another by the disjunctive "or." The natural meaning of the words "in contemplation of" the marriage, is, I think, in anticipation of and before the marriage. The natural meaning of the word "upon," when put in contrast, as it is here, with words referring to something that must take place before the marriage, is in my opinion after the marriage, and as the result or consequence of or in connection with that marriage, or, as has been said, "upon the occasion of the marriage."

That being so, it is not necessary for me to follow the other lines of argument. I will only say that, whatever doubt may be created by the 4th section, it appears to me not sufficient to alter the construction of words which in my judgment plainly justify a settlement on the occasion of a marriage, as well as a settlement in anticipation of a marriage.

The Lords Justices then proceeded to dispose of those parts of the case which had not been heard by the Lord Chancellor.

COTTON, L.J.:—

We will now dispose of that portion of the case which we heard before the Lord Chancellor came in.

An intimation has been made by the counsel appearing for the lady by her guardian that she is willing to execute the settlement if it is varied in certain particulars, and as we consider it advisable that the settlement should be varied in those particulars, it will not be necessary to decide all the questions which arise in this case.

She takes two objections to the settlement as drawn. She objects to the trustees and she objects to the form of one of the limitations. As regards the trustees the objection is a question of feeling on her part, and if we were asked to decide that the persons proposed and approved by the Court below as trustees were improper persons to be trustees, I should decline to do so.

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The lady, however, has a strong feeling on the point, whether reasonably or not it is unnecessary to consider. In my opinion it is highly desirable that the trustees of a settlement should be persons with whom the parties interested under the trusts can hold friendly intercourse, and the lady has stated reasons why these gentlemen, though perfectly fit persons to be trustees, are personally distasteful to her. Therefore I think the better course will be to substitute three of the persons whom she proposes, subject to there being satisfactory affidavits of their fitness. It is said that they are all friends or relations of the husband. That is so; but I asked whether there was any personal objection to any of them, and I was told there was not. Mrs. *Sampson* has been living with the husband's mother, and she and Captain *Sampson* are to be, during their joint lives, husband and wife. The trustees having no discretion to exercise as between husband and wife, why is it to be an objection to them that they are friends of the husband, and one of them a relation, it being almost impossible to get any on the other side of the family who can be named as trustees without objection on the part of the lady?

Then, as regards the more important question, the limitation of the wife's power of appointment. As I understand the matter, the principle on which the Court has always acted has been that where there is a marriage by a female ward without the leave of the Court, the Court will not allow the husband so offending to take any interest in the wife's property in his marital right, and in any settlement which may be made it does not, where there has been what may be called an intentional contempt of Court, give the husband by the settlement any interest in the property of his wife. But it is a very different question whether the wife should be deprived of all power of giving him an interest. For the settlement to give him an interest is one thing, for the wife to have a power to give him an interest is an entirely different thing; and although in this case the conduct of the husband was an intentional contempt of the authority of the Court, yet there is nothing against his moral character, and he is not in a position unequal to that of the lady. I think it is better for the married pair, and more conducive to the happiness of their married life, that the wife should not be fettered in the way proposed as

regards the disposition of her property by will in the event of there being no children. Undoubtedly in some cases the Court has thus limited the power, but it has not generally done so; and that being the case it cannot be said that we are departing from the practice of the Court in striking out this limitation of her power of appointment by will. In my opinion, therefore, the proper course will be to vary the settlement by striking out that limitation of her power, so that she will have a general power of appointment by will in the event of there being no children. As far as I can see, the object of the limitation has been to punish the husband. In my opinion this is not a good way of punishing him. He has been punished, and, I think, sufficiently punished, by being imprisoned for a considerable time, and I think it will be for the happiness both of husband and wife not to inflict a further punishment in this way.

On the other part of the case we at present give no opinion, and if the lady executes the settlement as altered, it will not be necessary for us to do so.

FRY, L.J.:—

I concur in everything that has been said by the Lord Justice.

The settlement as altered was executed by Captain and Mrs. *Sampson*, and the case was mentioned again on a subsequent day, when an order was made for discharging Captain *Sampson* from custody.

Solicitors for Captain *Sampson*: *Bartley & James.*
Solicitors for guardian: *F. J. & G. J. Brackinridge.*
Solicitors for wife: *Duncan, Warren, & Gardner.*

H. C. J.

C. A.
1884
Jan. 17.

Ex parte BRANDON. *In re* TRENCH.

Act of Bankruptcy—"Remaining out of England"—Domiciled Englishman residing Abroad—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 3.

A domiciled Englishman went in 1876, with his family, to reside in *France*, where he took a house. He was not then being pressed by any creditors in *England*. For a period of fourteen months in 1877 and 1878 he was in *England*, carrying on the business of a newspaper which he had purchased, and he then had a furnished lodging in *London*. During that period he retained his house in *France*, and his wife and family lived in it. During the same period he contracted a debt for costs to a solicitor in *London*. At the end of the fourteen months he discontinued the business, and went back to his residence in *France*. In 1880 he, with his family, occupied for nine months a furnished house in *England*, his house in *France* being let furnished; at the end of the nine months he returned to that house. He then continued to reside there, paying occasional visits to *England*. During one of these visits he accidentally met the solicitor, who asked him why he had not paid his debt, and he answered that his newspaper speculation had left him with a number of claims, and he thought if he kept abroad he should be able to settle them more easily. The solicitor presented a bankruptcy petition against the debtor, alleging as an act of bankruptcy that he had remained out of *England* with intent to defeat or delay his creditors:—

Held, that, as the debtor was remaining out of *England* at his own permanent residence abroad, no intent to defeat or delay his creditors could be imputed to him from that circumstance alone, and that the conversation with the petitioning creditor was not sufficient to prove such an intent.

THIS was an appeal against the dismissal by Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy, of a bankruptcy petition presented against *Henry Le Poer Trench*, a retired Major-General in Her Majesty's Indian army.

The petitioning creditors were Messrs. *G. S. & H. Brandon*, solicitors, who claimed a debt of £190 14*s.* 1*d.* in respect of costs. The petition alleged that *Trench* had committed an act of bankruptcy in that, being out of *England*, he had, with intent to defeat or delay his creditors, remained out of *England*. The petition was presented under the *Bankruptcy Act*, 1869, on the 15th of November, 1883. The debtor gave notice of his intention to dispute the act of bankruptcy. The petition was heard on the 13th of December, 1883. The debtor was examined, and from his evidence it appeared that in the year 1876 he went with

his wife and family to reside at *Boulogne*, where he took a house, and that he had ever since retained his residence there. When he went there he was not being pressed by any creditors in *England*. His wife died in 1879, and in 1881 he married again in *England*. In the years 1877 and 1878 he was for a considerable time in *England*, where he was engaged in the management of a publication called "*The Operatic and Dramatic Album*," which he had purchased. He then had a furnished bedroom in *Great Marlborough Street*, in *London*. In 1877 he discontinued the business (which he had carried on for about fourteen months), and returned to his residence at *Boulogne*. After that he paid occasional visits to *England*. The debt to Messrs. *Brandon* was contracted during the time when he was carrying on the publishing business. In 1880 for a period of nine months he occupied a furnished house at *Southall*, in *Middlesex*, where he resided with his family. During that nine months his house at *Boulogne* was let furnished. At the end of the nine months he returned to his house at *Boulogne*, and that house had since been his permanent residence.

In June, 1882, when the debtor was in *England* for a short time, Mr. *H. Brandon*, one of the petitioning creditors, accidentally met him on *Putney Bridge*, and asked him how it was that he had not paid the debt due to his firm. Mr. *Brandon* added, "I understand you have married a lady of property, and instead of at once settling you have gone away, and no one knows where to find you." The debtor replied, "That confounded speculation of the '*Album*' left me with a lot of claims upon me, and I feel that if I keep abroad I shall be able to settle them more easily." Mr. *Brandon* said, "I don't care what you do, whether you keep abroad or not, but we want to be paid." The debtor answered, "Well, you may rely on it, that before I go back, I will call at your office and make you a proposition." He added that he would come within a week. Mr. *Brandon* deposed that the debtor did not keep this promise.

Finlay Knight, for the Appellants:—

The continued residence of the debtor abroad has the effect of defeating or delaying the petitioning creditors, and it is well settled that a man must be taken to intend that which is the

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natural consequence of his actions: *Ex parte Kirkman* (1). Why should we be bound to follow him abroad? *Ex parte Bunny* (2) shews that, whatever the original intention of the debtor in going abroad, the Court must have regard to his intention in remaining abroad.

[EARL OF SELBORNE, L.C.:—The residence abroad existed before the debt was contracted. Do you say that a man who has his home in a foreign country is bound to come to *England* to be sued by an English creditor?]

If an Englishman who lives abroad chooses to come to *England* and contract debts, he ought to come there to be sued. It is not like the case of a foreigner who comes to *England* for a time and contracts debts there, and then returns to his own country: *Ex parte Crispin* (3). And here the debtor told Mr. *Brandon* that his reason for remaining abroad was that he thought that by doing so he could more easily settle with his English creditors. This is a clear expression of an intention to delay them.

Sidney Woolf, for the debtor, was not called upon.

EARL OF SELBORNE, L.C.:—

The act of bankruptcy which is alleged consists in the debtor's remaining out of *England* with intent to defeat or delay his creditors. The question whether such an act of bankruptcy has been committed must be considered with regard to the circumstances of the foreign residence of the debtor. Here the debtor, from a period anterior to the contracting of the petitioning creditors' debt, had a *bonâ fide* residence in *France*, which, so far as appears, is the only residence, properly so called, which he has had from that time to the present. Assuming that he retained his English domicil, still the original constitution of his foreign residence cannot, so far as the evidence goes, be said to have taken place with the intention of defeating or delaying his creditors. What are the other facts? The debtor appears to have been carrying on in *London* during a part of the years 1877 and 1878 the business of publishing a musical newspaper, for the purpose of which he was a good deal in *England*. He did not

(1) 3 D. & Ch. 450. (2) 26 L. J. (Bkcy.) 83.
(3) Law Rep. 8 Ch. 374.

during that period give up his foreign residence, but he took a furnished lodging in *London*, which he gave up when the object which brought him to *London* had ceased. In the course of that residence in *England* he contracted the debt on which this petition is founded. In the year 1880 he was again in *England* for some months, occupying with his family a furnished house at *Southall*. The circumstance which bears most strongly against him is the conversation which took place between him and Mr. *Brandon* on *Putney Bridge*. But, if that conversation was an honest one,—and there is nothing to lead to a contrary conclusion,—I think the proper inference to be drawn from it is that he really thought that when he was at home at his residence in *France* with his wife and family, at the place where the people were living who were in the habit of giving him credit, it would be more easy for him to settle with his English creditors than if he were in *England*. And I cannot leave out of consideration the fact that *France* is a civilized country, in which creditors can sue their debtors. It does not appear that the petitioning creditors have been in any way baffled by the debtor in the pursuit of their remedies against him there. These are all the facts, and they amount to this, that the debtor stays at home, his home being in a foreign country. Can we, upon the principle that a man must be taken to intend the natural consequence of his acts, say that he remained out of *England* with intent to defeat or delay his creditors? If a debtor had left this country in order to place himself beyond the reach of its laws, the presumption that by so doing he intended to defeat or delay his creditors might arise; but the present case is entirely different and I think that such an intention ought not to be presumed. The cases which have been cited are not in favour of the argument; indeed *Ex parte Crispin* (1) is rather against the contention of the Appellants. There it was held that a foreigner, who had been temporarily resident in *England* and had contracted a debt here, and who left *England* for his own country the day after he had appeared to a writ which the creditor had served on him, could not, in the absence of other evidence, be assumed to have left *England* in order to defeat or delay his creditors. And Lord Justice *Mellish*, who

(1) Law Rep. 8 Ch. 374.

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delivered the judgment of the Court, said (1), speaking of the act of bankruptcy which is now in question: "We think these words imply that the person who remains out of *England* has his home or place of business in *England*, and cannot reasonably be held to apply to the case of a foreigner remaining in his own home." I think the Registrar's order ought to be affirmed.

COTTON, L.J.:—

I am of the same opinion. The question is whether the debtor remained out of *England* with intent to defeat or delay his creditors. No doubt a man is to be presumed to intend the natural consequences of his acts. But are there not in the present case other reasons why the debtor should remain out of *England?* He has no residence or business here. He had, no doubt, at one time a temporary business and a temporary residence in *London*, but since the business came to an end he has been residing in *France*. I think that a reasonable cause has been shewn for his remaining out of *England*, and the only thing to set against it is the conversation which he had with Mr. *Brandon* on *Putney Bridge*. But I agree with the Lord Chancellor that this conversation is not of itself sufficient to induce us to come to the conclusion that he remained abroad in his own home with the intention of defeating or delaying his creditors.

FRY, L.J.:—

I am of the same opinion. The only thing which raised any doubt in my mind was that conversation with Mr. *Brandon*. But, when it is carefully considered, I do not think it shews that the debtor had any intention of defeating or delaying his creditors. I believe he rather meant to say that he thought his continuing in *France*, instead of delaying his creditors, would expedite the payment of their debts. I do not think he remained abroad with intent to defeat or delay them.

Solicitors for Petitioning Creditors: *G. S. & H. Brandon.*
Solicitors for Debtor: *Lumley & Lumley.*

(1) Law Rep. 8 Ch. 380.

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Jan. 25;
Feb. 1.

Proof in Bankruptcy—Proof by Partner—Competition with Creditors.

The rule, that neither a partner, nor a retired partner, nor the representatives of a deceased partner, can prove in the bankruptcy of the continuing or surviving partner or partners in competition with the joint creditors of the firm of which the partner, or retired or deceased partner was a member, has no application unless there has been actually proved in the bankruptcy some debt in respect of which the bankrupt or bankrupts and the retired or deceased partner were jointly liable.

The mere possibility that such debts may be proved in the bankruptcy is not sufficient to introduce the application of the rule.

THIS was an appeal from an order made by Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy, admitting a proof tendered in the liquidation of *Arthur Wilcoxon*, who had carried on business under the firm of *A. & R. Wilcoxon*.

The proof in question was tendered by *E. F. Herring* and *Thomas Perkins*, as executors of *Arthur Wilcoxon* deceased (an uncle of the liquidating debtor), for the sum of £10,407 17*s.* 6*d.*, "as to the sum of £10,000, part thereof, for money due to the testator at his decease upon an account stated, and allowed by us to remain by way of loan to the debtor, subject to the payment of interest thereon, and as to the remainder of the said sum of £10,407 17*s.* 6*d.* for interest on the said sum of £10,000 from the 30th of September, 1880 to the 24th of July, 1881."

The business which the debtor had carried on was originally carried on in partnership by *Robert Wilcoxon* (the father of the debtor) and his brother *Arthur Wilcoxon* (the testator). In the year 1861 two sons of *Robert Wilcoxon*, viz.: *Arthur Wilcoxon* (the debtor) and *Charles Wilcoxon*, were admitted into the partnership. On the 5th of September, 1866, *Robert Wilcoxon* died. By his will he appointed *Arthur Wilcoxon* (the debtor), *Charles Wilcoxon*, and *F. G. Wilkinson* executors and trustees thereof. The will provided that the testator's share of the capital of the business should remain in the business for a limited period. This share was in fact allowed by his trustees and executors to remain in the business after that period had expired. On the 1st of

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December, 1866, *Wilkinson* was admitted into the partnership, and the business was thenceforth carried on by *Arthur Wilcoxon* (the testator), *Arthur Wilcoxon* (the debtor), *Charles Wilcoxon*, and *Wilkinson*, in partnership, until the 1st of July, 1875, when the partnership was dissolved, as from the 27th of May, 1875, by a decree of the Court of Chancery, made in a suit of *Wilcoxon* v. *Wilkinson*.

After this decree, the business was carried on by *Arthur Wilcoxon* (the debtor) and *Charles Wilcoxon* in partnership. The capital of *Robert Wilcoxon* was still retained in the business, and £10,000, part of the capital of *Arthur Wilcoxon* (the testator), was left by him in the business as a loan at interest. In September, 1876, the partnership between the debtor and *Charles Wilcoxon* was dissolved, the debtor taking to the business and the assets, and covenanting to pay the debts, including the £10,000 due to *Arthur Wilcoxon* (the testator), and the interest thereon.

Wilkinson died in 1876. *Arthur Wilcoxon* (the testator) died in March, 1878. The debtor carried on the business, under the firm of *A. & R. Wilcoxon*, until the 24th of July, 1881, when he filed a liquidation petition. In 1882, a judgment for the administration of the estate of *Arthur Wilcoxon* (the testator) was pronounced in an action brought by his executors in the Chancery Division, and the usual notice to creditors to come in and prove their debts was issued. His executors tendered the above proof in the liquidation in August, 1881. About the same time some of the beneficiaries under the will of *Robert Wilcoxon* tendered proofs in the liquidation in respect of their beneficial interests, stating in their proofs that the debtor was, jointly with *Charles Wilcoxon*, indebted to them, he and *Charles Wilcoxon* being trustees for them under the will of *Robert Wilcoxon*. The debtor in his character of trustee joined in the proofs, but *Charles Wilcoxon* declined to join. These proofs were admitted by the trustee in the liquidation.

None of the beneficiaries under the will of *Robert Wilcoxon* claimed to prove in the administration action, and those of them who had proved in the liquidation had, in February, 1883, in reply to notices from the solicitors to the executors of *Arthur*

Wilcoxon (the testator), requiring them to come in and make any claim they might have against his estate, written letters to those solicitors, stating that they had been advised that they had no legal claim against the estate of that testator in regard to their interests under the will of *Robert Wilcoxon*, and that they intended to take no proceedings in the matter.

The Chief Clerk of Vice-Chancellor *Bacon* had by his certificate in the administration action certified that there was not any debt of *Arthur Wilcoxon* (the testator) remaining unpaid. No proof had been tendered in the liquidation in respect of any debt for which the debtor and *Arthur Wilcoxon* (the testator) were jointly liable (other than the above-mentioned proofs by the beneficiaries under the will of *Robert Wilcoxon*), and it did not appear, nor was it suggested that (with the exception of the sums due to those beneficiaries) there were any debts remaining unpaid in respect of which the debtor and *Arthur Wilcoxon* (the testator) had been jointly liable. The trustee in the liquidation rejected the proof of the executors of *Arthur Wilcoxon* (the testator), on the ground that they would be proving in competition with their testator's own creditors. The Registrar ordered the proof to be admitted.

The trustee appealed.

Horton Smith, Q.C., and *Sidney Woolf*, for the Appellant:—

The rule is well settled that a partner cannot prove in the bankruptcy of his co-partner in competition with the creditors of the firm, who are also his own creditors, and the rule extends to the representatives of a deceased partner: *Nanson* v. *Gordon* (1); *Ex parte Carter* (2); *Ex parte Bass* (3); *Ex parte Sillitoe* (4); *Ex parte Blythe* (5). The stringency of the rule is shewn by *Ex parte Collinge* (6), in which case Lord *Westbury* refused to relax it, though the result of doing so would have been to increase the proving estate to such an extent that it would have yielded a larger surplus to the joint estate than would have arisen from the estate sought to be proved against if the proof was excluded.

(1) 1 App. Cas. 195.
(2) 2 G. & J. 233.
(3) 36 L. J. (Bank.) 39.
(4) 1 G. & J. 374.
(5) 16 Ch. D. 620.
(6) 4 D. J. & S. 533.

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In *Ex parte Topping* (1) the proof of one partner for a debt due to him by the other was allowed against the separate estate of the other, but only because it was admitted that there could not be any surplus of the debtor partner's estate for the joint creditors, whether the proof by the creditor partner was admitted or not. A breach of trust was committed while *Arthur Wilcoxon*, the testator, was a member of the firm, in allowing the capital of *Robert Wilcoxon* to remain in the business for a longer time than was authorized by his will, and for that breach of trust the testator was jointly liable with the debtor and the other partners. In respect of that joint liability the beneficiaries under the will of *Robert Wilcoxon* have a right to prove in the liquidation, and the testator's executors cannot prove in competition with them. In fact they have already proved for their interests in the trust fund under that will.

[EARL OF SELBORNE, L.C.:—The proofs which they have made are against the debtor as a trustee for them under the will of *Robert Wilcoxon*, not in respect of a joint liability of the debtor and the testator.]

It is really in substance the same debt. And these beneficiaries are entitled to prove in the action to administer the testator's estate: they have in no way bound themselves not to do so. They have said they have no intention of doing so, but they may change their minds. The rule applies if there is any possibility that there may be a competition between the testator's executors and creditors of the firm of which he was a member. An executor who is a partner in a business, and who allows trust money to be employed in the business, is liable to his *cestui que trust* for his share of the profit made by the employment of the money.

[EARL OF SELBORNE, L.C.:—It was so held by Lord *Romilly*, M.R., in *Jones* v. *Foxall* (2); but his view was disapproved in the House of Lords in *Vyse* v. *Foster* (3).]

There are other authorities to that effect: *Ex parte Heaton* (4);

(1) 4 D. J. & S. 551.
(2) 15 Beav. 388.
(3) Law Rep. 7 H. L. 318, 346.
(4) Buck. 386.

Ex parte Woodin (1); *Ex parte Poulson* (2); *Lindley* on Partnership (3).

Marten, Q.C., and *Finlay Knight*, for the executors, were not heard.

Feb. 1. EARL OF SELBORNE, L.C., delivered the written judgment of himself, Lord *Coleridge*, C.J., and *Cotton*, L.J.:—

This appeal is against the admission of a proof in a liquidation, which is said by the Appellant, the trustee in the liquidation, to fall within the rule which it is convenient to state (as Lord *Cairns* in *Nanson* v. *Gordon* (4), stated it), in Lord *Eldon's* words, that "a partner in a firm against which a commission of bankruptcy issues, shall not prove in competition with the creditors of the firm, who are in fact his own creditors, and shall not take part of the fund to the prejudice of those who are not only creditors of the partnership, but of himself" (*Ex parte Sillitoe* (5)). This rule extends to the case of a retired or deceased partner, when the continuing or surviving partners or partner have or has become bankrupt, but we think it is essential for its application that there should be some creditors proving under the bankruptcy for a debt or debts in respect of which the present or former partner, whose proof is excluded, and the bankrupt were jointly liable.

The proof now in dispute is by the executors of a deceased partner, *Arthur Wilcoxon* the elder, for a debt clearly provable, unless it comes within that rule. The testator (we shall so call him to avoid confusion of names), had been in partnership with the liquidating debtor and two other persons (all three of them executors of the testator's brother *Robert Wilcoxon*) for some years prior to July, 1875, when that partnership was dissolved. The liquidation commenced in 1881. The testator was not liable for any debt contracted after the dissolution of that partnership. It does not appear (and, with the exception which we shall pre-

(1) 3 M. D. & D. 399.
(2) De G. 79.
(3) 3rd Ed. vol. ii. p. 1037.
(4) 1 App. Cas. 195, 201.
(5) 1 G. & J. 374, 382.

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sently mention, it is not suggested) that any joint debt or liability of the partnership of which the testator was a member still remains unsatisfied. The suggested exception is that of certain legatees under the will of *Robert Wilcoxon*. But those legatees have not in fact proved, or claimed to prove, in respect of any such debt or liability, nor has any other person done so. On the contrary, the legatees have proved against the debtor as their trustee under *Robert Wilcoxon's* will, a character which the testator, *Arthur Wilcoxon*, never filled. They had a clear right to do so, for the debtor was making use of the trust funds, in respect of which their proofs were made, in the business carried on by him at the time of his liquidation. If they had any claim against the estate of the testator, *Arthur Wilcoxon*, they might have established it under the judgment for the administration of that estate, but they did not do so. On the contrary, they expressly stated to the solicitors of *Arthur Wilcoxon's* executors that they were advised that they could not make, and that they did not intend to make, any such claim. We do not think that in this state of circumstances the executors of the testator, *Arthur Wilcoxon*, ought to be now called upon to discuss or litigate with the trustee in the liquidation the question whether, if made, such a claim could have been established. Down to July, 1875, the testator was jointly liable with his then co-partners for *Robert Wilcoxon's* share of the capital of an earlier firm of which *Robert Wilcoxon* had been a member, and which remained in the business as carried on after his death. But to prove or disprove a claim founded on an assertion of the continuance of that liability after July, 1875, when the testator retired, and after which time two of the executors of *Robert Wilcoxon* alone carried on the business, other facts might, in our opinion, be material, besides those which are now before the Court. If any proof in respect of a joint liability of the testator and the debtor should hereafter be made in the liquidation, or if, by proceedings against the executors of the testator, it should be established that he was at the time of his death liable jointly with the debtor for the trust fund in respect of which proof has been made, the trustee in the liquidation will then be at liberty to apply to the proper Court as he may be advised. We think

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that at the present time no case is shewn for the application of the rule on which the Appellant relies, and that the appeal ought to be dismissed with costs.

Solicitor for Trustee: *H. Montagu.*
Solicitors for Executors: *Hughes, Hooker, & Co.*

W. L. C.

GOLDSMID *v.* GREAT EASTERN RAILWAY COMPANY.

C. A. 1882

V.-C. B. *Dec.* 12, 13. 1883 *Jan.* 12, 16.

C. A. 1883 *Dec.* 11, 13, 15, 17, 18.

[1882 G. 86.]

Market — Disturbance — Injunction — Alleged Failure on part of Owners to provide Adequate Accommodation — Waiver of Statutory Rights — Illegality.

Failure on the part of the lord of a market to afford sufficient accommodation for the public is not a defence to an action for disturbance by the setting up of a rival place of sale, although it is a defence to an action against a dealer who cannot find room in the market.

In order to make a Defendant liable to an action for disturbance of a market it is not necessary to prove that he acted with the intention of defrauding the Plaintiffs of their tolls by taking advantage of the concourse at their market.

A statute, or charter having the force of a statute, may be waived by the party for whose benefit it was enacted, so as to render the acts of persons disregarding it legal.

A charter was granted by *Edward* III., with the advice of his Parliament, to the city of *London*, conferring certain privileges on the citizens, and granting that no market should be held within seven miles of the City. A charter was granted by *Charles* II., in 1682, to the Plaintiffs' predecessors in title, giving them the right to hold a market "in or next to *S. Square*," which was within seven miles of the City.

User of the market was proved from 1723.

The Plaintiffs built houses at *S. Square*, and let many of them for purposes unconnected with the market, and there was evidence that the market was very crowded, that it was difficult for dealers to get stalls there, and that substantially the whole market area was let by the year, month, or week, leaving no space for the general public. The Defendants, who were a railway company, established a depôt or row of shops at their terminus, which was within 300 yards of *S. Square*, and let them to dealers for the purpose of selling vegetables brought up by their railway; the company also circulated their tenants' advertisements inviting consignments of produce; no persons were allowed to sell except the tenants of the shops. The Plaintiffs brought an action to restrain the Defendants from interfering with their market rights:—

Held, that although the charter of *Edward* III. had the force of an Act

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of Parliament, the Corporation of *London* might waive their rights as to establishment of markets, and that the Court would presume that they consented to the charter of 1682.

Held, also, that the depôt of the Defendants, although not technically a market, was a disturbance of the Plaintiffs' rights, and made them liable to an injunction: and that even if the Plaintiffs' mode of conducting their market would preclude them from maintaining an action against a tenant of the Defendants, yet it did not preclude them from bringing an action against the Defendants to restrain them from establishing a rival place of sale in the neighbourhood.

Islington Market Case (1) and *Prince* v. *Lewis* (2) considered.

BY letters patent, dated the 29th of July, the 34th of *Charles* II. (1682), reciting an inquisition founded on a writ of *ad quod damnum*, the King granted the right of holding two markets every week, whereof the first was to be on Thursday and the other on Saturday, "in or next to a certain place called the *Spittle Square*, in the parish of *Stepney*, otherwise *Stebonheath*, in the county of *Middlesex*, unto and to the use of *John Balch*, his heirs and assigns for ever."

By other letters patent, dated the 22nd of September, the 4th of *James* II. (1688), on the petition of the then owner of the market under the former grant, a right to hold the market "in or near" the place aforesaid, called "*Spittle Square*," on Monday and Wednesday in every week, was granted to and to the use of the Petitioners and their heirs, instead of on Thursday, the grant of the Thursday market was revoked, and in other respects the former patent was confirmed.

The present Plaintiffs, Sir *Julian Goldsmid*, Bart., and three others, claiming to be successors in title to the above grantees, and to be owners in fee of nineteen twenty-fourth parts of a square piece of land which included the market-place *Spitalfields Market* estate, and of three-fourths of *Spitalfields Market* for the sale of fruit and vegetables, with a right to collect tolls, dues, piccage, stallage, and other profits and perquisites connected therewith, and the co-Plaintiff, *Robert Horan*, their lessee, on the 11th of January, 1882, issued the writ in this action against the Defendants, the *Great Eastern Railway Company*, for an injunction to restrain the Defendants from establishing a fruit and

(1) 12 M. & W. 20, n.; 3 Cl. & F. 513. (2) 5 B. & C. 363.

vegetable market on the site of their old *Bishopsgate Station*, *High Street*, *Shoreditch*, and from otherwise interfering with the rights of the Plaintiffs as such owners as above stated.

The square piece of land was bounded by four streets, called *Commercial Street*, *Lamb Street*, *Crispin Street*, and *Brushfield Street*, and the Plaintiffs alleged that their title extended *ad medium filum* of these streets. It ultimately appeared, however, mainly from evidence adduced before the Court of Appeal, that with the exception of some narrow strips the soil of the streets was not in the Plaintiffs. For thirty or forty years before the action it appeared that the lessees of the market had been in the habit of holding their market (for fruit and vegetables only) over so much of the square piece as was not built on, using for the purpose of standings for waggons one half of the four streets so far as that space was capable of being so employed. The interior of the square piece consisted of an inner square known as the *Market Place*, connected with the four bounding streets by four streets at right angles to them called *North Street*, *East Street*, *South Street*, and *West Street*. The area of the market-place was partially built on, and the areas between the streets were covered with houses. Many of these buildings, including some on the market-place itself, were let to tenants who used them for other purposes than the sale of fruit and vegetables. The rest were let to fruit and vegetable dealers, and substantially the whole area of the market-place and streets available for the standing of waggons was let out by the year, month, or week, so as to leave little or no space available for the public who might wish to sell, except that they would be allowed later on in the day to occupy stands the tenants of which happened not to be using them. During a great part of the year, especially on Saturdays, the streets were crowded and crammed. The days on which markets were regularly held were Tuesdays, Thursdays, and Saturdays, but tolls were taken on any sales on the intervening days also.

By their statement of claim, delivered on the 15th of July, 1882, the Plaintiffs said that they first discovered in December, 1881, that the Defendants had in contemplation the establishment of a market for fruit and vegetables at a distance of not more than 300 yards from the Plaintiffs' market, namely, at

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the company's goods station at *Bishopsgate*, which was being constructed out of a former high level passenger station, and was raised on arches; and alleged that the Defendants intended to establish a market in the arch spaces, by converting them into warehouses for storage of fruit, vegetables, and other articles of food.

They further said that the Defendants had largely advertised their proposed new market, but that, since the writ was issued, and the injunction moved for, they had removed the word "market" from their plans and advertisements, and substituted the word "depôt." The Plaintiffs submitted that the establishment by the Defendants of this market was an invasion of the Plaintiffs' rights, and constituted a fraud upon the market, and claimed an injunction that the Defendants might be restrained from establishing a fruit and vegetable market at *Bishopsgate* aforesaid, and from using or permitting to be used any part of their new erections or premises as warehouses for the storage or sale of fruit or vegetables, so as to interfere with the Plaintiffs' market rights; also from advertising or causing to be advertised their new erections or premises as a market, or depôt, or otherwise, for the storage or sale of fruit or vegetables.

The statement of defence set up the inadequacy of the market accommodation as a defence, and in support of it relied on two local Acts of Parliament, 28 Geo. 3, c. lx. s. 11, and 57 Geo. 3, c. xxix. s. 65, by which penalties were imposed upon any one who should (among other things) set, place, or expose to sale, or cause or permit to be set, placed, or exposed for sale any wood, coals, fruit, &c., in the foot or carriage-ways of the streets of the district, including the eight streets before named. They also stated that many warehouses and shops for the storage and sale of fruit and vegetables had been built and used outside the limits of the market, much nearer than the Defendants' warehouses, and that no tolls had ever been collected as of right in respect of them. They further said they proposed to convert their railway arches into warehouses, and to let them as warehouses for a fixed rent. They admitted that for the sale of produce borne by their railway they formerly used the word "market," but said they used it "in a conventional or popular,

and not in a legal, sense." They said that such erection and letting would not constitute a market in the legal or technical sense, and would not be an invasion or disturbance of the Plaintiffs' market.

For the purpose of shewing what the intention of the Defendants originally was, an article, published in the *City Press* of the 14th of December, 1881, circulated though not published by the Defendants, was read by the Plaintiffs. Extracts from this article will be found in the judgment of the Vice-Chancellor.

The Defendants let out their arches as stores to dealers in fish, potatoes, and other vegetables under agreements terminable at a month's notice. The depôt was opened for sales on the 1st of July, 1882. The opening was largely advertised by the Defendants by placards and bills headed "Opening of Potato, Fruit, Vegetable, and General Depôt at *Bishopsgate Goods Station*," and the dealers who had taken the stores then issued circulars to their correspondents in the country inviting consignments of vegetables to the new depôt which the company assisted in distributing. In some of these circulars the attention of the growers was called to the fact that they could save cartage and toll charges which would be paid if the goods were sent to any other market.

Various letters were put in evidence between the district goods manager of the Defendants in *London* and the local district manager as to the letting of the arches as stores, and also letters from the district goods manager to tenants of the arches urging them to get in produce for sale and to commence business at the new depôt.

It was proved that the new depôt was only intended for goods brought from the country by the company's railway, and that it was not open for any persons except the tenants of the arches to sell their goods there.

A great number of witnesses were examined in Court with respect to the adequacy of the Plaintiffs' market at *Spitalfields* for accommodating those who wished to buy and sell in the market.

The action came on for hearing before Vice-Chancellor *Bacon*, on the 12th of December, 1882.

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Sir *H. Giffard*, Q.C., *Cozens-Hardy*, Q.C., and *Micklem*, for the Plaintiffs:—

The action is for disturbance of a right of market, and it will be found that the whole case of the Plaintiffs is covered by authority.

Where an ancient market has been created by letters patent, establishment of a rival market within what was called "the common law limit," which seems to be seven miles, is an actionable wrong. From a case in 1670 of *Yard* v. *Ford* (1), it further appears that if a new market be set up near an ancient market on the same day of the week, it is an actionable disturbance at law; if it be set up on another day of the week, the question of nuisance or no nuisance is one for a jury.

This was followed by a long series of authorities down to 1827, when, in a case of *Mosley* v. *Walker* (2), it having been submitted to the jury whether as a fact the plaintiff, the lord of a market, had an exclusive right of sale of certain commodities in his market, and whether the defendant, who had been selling similar commodities in a private house or shop, had been driven to do so from inconvenience or insufficiency of space in the market, a verdict was given for the plaintiff, and the Court of King's Bench refused to grant a new trial. In a note to the same case is reported a decision of the same Court in a case of *Mosley* v. *Chadwick* (3). The result of a special verdict in that case was, that the plaintiff was seised of a franchise for holding a market, and that the defendants had erected a number of stalls near his market, but took no toll; they had no pretence of a *pie-poudre* Court, and no clerk of the market; they only took rent for their stalls. The question was whether an action upon the case would lie, and Lord *Mansfield*, in delivering judgment, said that the Court, upon the authorities cited, were of opinion that this was a damage that carried with it that sort of injury that was sufficient to support an action.

On the discussion of the *Islington Market* Bill in the House of Lords in 1835, *Littledale*, J., gave an answer, on behalf of himself and *Parke*, B., to certain questions put by the House to the

(1) 2 Saund. 172; S. C. 1 Lev. 296. (2) 7 B. & C. 40.
(3) 7 B. & C. 47, n.

Judges; and in that answer is the following passage: "We are of opinion that whilst the grant" (of a market) "remains unrepealed, the default of providing proper accommodation for the public cannot operate in point of law as a ground for granting a new charter to another, to hold a market within the common law distance, which shall really be injurious to the existing market": *Islington Market Case* (1).

The broad proposition therefore cannot be disputed that that which shall be found upon investigation by a proper tribunal to be a disturbance, is *primâ facie* an actionable wrong; but in *Mosley* v. *Walker* (2) a distinction was taken. In that case the lord of the market established by prescription not only a right against a rival market, but a right to prevent a person from selling marketable commodities in his own house or shop. We concede that not every grant of market involves, as a consequence, this privilege; but this is the only limitation that has ever been imposed upon the lord. Authorities may be found which say that the lord's right does not extend to preventing sales by persons in their own houses or shops; no authority has ever questioned the right of the lord to interfere with a rival market: *Pope* v. *Whalley* (3); *Fearon* v. *Mitchell* (4).

In *Elwes* v. *Payne* (5), where a market had been set up on other days than those of the existing market, the present Master of the Rolls thought that an immediate injunction ought to be granted. The Court of Appeal differed, because they said it would be extremely difficult to estimate the amount of damages; but as to the principle of law there was no difference whatever.

A similar issue to the present was tried by Vice-Chancellor *Little* in April, 1876, in a case of the *Corporation of Manchester* v. *Peverley* (6), and the learned Vice-Chancellor's judgment was adopted by the Court of Queen's Bench in a case of the *Corporation of London* v. *Low* (7). In that case the Court said that it was quite unnecessary to pronounce an opinion as to whether what the defendants were doing constituted a market or not;

(1) 12 M. & W. 23, n.; 3 Cl. & F. 513.
(2) 7 B. & C. 40.
(3) 6 B. & S. 303, 310.
(4) Law Rep. 7 Q. B. 690.
(5) 12 Ch. D. 468.
(6) 22 Ch. D. 294, n.
(7) 42 L. T. (N.S.) 16.

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"the establishment of a new market, and thereby infringing the rights of the owners is not *per se* actionable. It is actionable only because it constitutes a disturbance;" and expressly laid it down that a disturbance might be occasioned by something very short of the establishment of a new market.

Arthur Charles, Q.C. (with him *Hemming*, Q.C., and *Smart*), for the Defendants:—

The name by which the Defendants' establishment is called is immaterial; and it is not disputed that there may be a disturbance of right of market short of setting up a new market. The sole question is whether what the Defendants have done, and are doing, is a disturbance of the Plaintiffs' rights.

First, then, the Defendants have not established a new market. A market is a place to which the public may resort for the buying and selling of their goods. What the railway company have done is to let several arches to tenants as warehouses for the sale of fish, vegetables, and fruit. In this respect they have done no more than has been done by the owners of twenty-seven warehouses close to *Spitalfields Market*, from which goods are sold both on and off market days, without objection from the lessee of the market. The market rights were granted by the charter of *Charles* II. for Thursdays and Saturdays; by the charter of *James* II. Saturday was retained as a market day; Thursday was abolished; and Monday and Wednesday were added to Saturday. The evidence which has been adduced is evidence of user on Tuesday, Thursday, and Saturday. Existence of market rights on Tuesday and Thursday can be supported by the Plaintiffs only on the theory of prescription or lost grant, and this is excluded by the fact that the origin of the market is pleaded and proved. There is no market therefore except on Saturday. Taking then the Saturday market, it is at least clear that the Plaintiffs' right does not extend to preventing people from selling marketable commodities outside the limits of the market in private shops or warehouses: *Mayor of Penryn* v. *Best* (1). No such extended right as this is to be found in the charter; and the evidence shews that in the four streets adjoining the market

(1) 3 Ex. D. 292.

marketable commodities have been sold in warehouses from time out of mind. None of these shopkeepers pay tolls on market days. Then what are the limits of the Plaintiffs' market estate? It has been attempted to be shewn by evidence that the market extends to the inner half of the four surrounding streets, and it has been shewn that the owner of the market takes tolls from waggons standing in those streets on market days. It is submitted that this is an usurpation on the part of the owner, and unlawful; and that the rights of market are limited to the market square, and even if it should be thought not to be so limited it would at the utmost only include the four streets which intersect it. The statutes, the provisions of which have been invaded by the Plaintiffs, are 12 Geo. 3, c. 38; 28 Geo. 3, c. lx.; 57 Geo. 3, c. xxix., and the *Metropolis Management Act*, 1855 (18 & 19 Vict. c. 120), whereby the *Whitechapel* District Board of Works is armed with the authority conferred by the former Acts, especially the 28 Geo. 3, c. lx., the *Whitechapel Parish (Christ Church)* Local Act. This Act applies not only to the four surrounding, but also to the four intersecting streets, and it prohibits (sects. 11 and 12) the sale in the streets of "roots, greens, fruit, fish, flesh," or other goods and chattels; the setting up of stalls, or the hanging up of carcases of animals "so as to obstruct or incommode the passage of" the foot or carriage-ways; and the leaving of "any cart, waggon, wheelbarrow, or other carriage" therein, "other than for the necessary loading and unloading thereof." Modern user, though it may often establish a right by presumption of lost grant, cannot do so when it is in contravention of express enactment. Supposing, however, that the overflow of the market into the eight streets is lawful, has there been sufficient accommodation? The evidence is that the market on market days, especially Saturdays, is "crowded" and "crammed." The Plaintiffs cannot keep up with, as they cannot control, the increase of population, and the greater amount of traffic in the streets. But they have done this: they have granted leases of their market space to persons who do not deal in marketable commodities. They have reduced the market area available for the public almost to nothing by letting out substantially the whole space to different persons for standing room. Under these

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circumstances they are disentitled to bring their action, not only by reason of the leases which they have themselves granted, but by reason of leases of their predecessors by which they are bound: *Prince* v. *Lewis* (1). When a trader knows that if he resorts to a market he will, five times out of six, find no room, he has a right to assume he may sell elsewhere. In *Mosley* v. *Walker* (2), cited in the opening, the main question was as to the lord's right to prevent selling in private shops. Two questions were left to the jury—one, whether the lord had established by evidence his right to prevent; the other, whether the defendant had shewn sufficient ground from inconvenience for selling outside. Both questions were found for the plaintiff, and the Court refused a new trial. But the question of inadequate accommodation did not arise there, for the defendant himself had a stall in the market, and might have gone there himself, if he had liked. The point of the *Manchester* case was, that the defendants by selling near to the market, had got the trade connection of the market for their own benefit. That is not at all the sort of case set up by the present Plaintiffs. The Plaintiffs would have no right of action against any one of the tenants of the Defendants' warehouses; then what right can they have against the landlord of the tenants? This row of warehouses is not a market; no one has any market rights there; no toll is taken; the public cannot come there to sell. The Plaintiffs have given no evidence as to any diminution of toll arising from the acts of the Defendants, except that some potato salesmen say that diminutions have taken place in the sale of that article. The market owner does not say he has suffered; he only predicts damage in the future. Finally, the sales at the depôt are sales to wholesale dealers, and the result is that more goods have been delivered in *Spitalfields Market* in waggons of the company than were ever delivered before. We submit, therefore—1. The Plaintiffs have, by their conduct, disentitled themselves to sue; 2. The market is insufficient for the wants of the public, inasmuch as it overflows into the adjoining streets; 3. If these adjoining streets are lawfully part of the market, still there is want of adequate accommodation; 4. What the Defendants have been doing is not the setting up of a new market.

(1) 5 B. & C. 363. (2) 7 B. & C. 40.

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Hemming, Q.C., on same side:—

The case of *Yard* v. *Ford* (1), cited in the opening, merely decides that where a new market is opened sufficiently near to an old market to create an injury, but on a different day of the week, the question of injury or no injury is one for the jury. There was no suggestion there of inadequate accommodation. The cases abundantly shew that if a lord does not supply ample accommodation he must be non-suited. Nearly all the cases relied on by the Plaintiffs were cases of markets where the lord had a special monopoly of sale. For example, *Mosley* v. *Walker* (2) and *Mosley* v. *Chadwick* (3) related to *Manchester*, where the lord's absolute monopoly of sale on market days was proved. There is another class of markets enjoying a special monopoly under the *Markets and Fairs Clauses Act*, 1847 (10 & 11 Vict. c. 14) (4). Under this Act many markets have been established, and nice questions have arisen as to what is, and what is not, within the exception to the monopoly created by the statute in favour of sales in shops. *Pope* v. *Whalley* (5), and *Fearon* v. *Mitchell* (6) are examples. The case is entirely different when you have to deal with an ordinary market with nothing more than the Common Law rights and obligations inherent in all markets, and no special monopoly. The two other cases relating to the *Manchester* market which were cited were cases arising out of new rights, conferred by a local Act in 1846, which, according to Vice-Chancellor *Little* in *Corporation of Manchester* v. *Peverley* (7), and Vice-Chancellor *Bristowe* in *Corporation of Manchester* v. *Lyons* (22 Feb. 1882) affirmed on appeal (8), abrogated all the previous rights, so that the old market with its monopoly thenceforward ceased to exist, and the case turned on the provisions

(1) 2 Saund. 172.

(2) 7 B. & C. 40.

(3) 7 B. & C 47, n.

(4) Sect. 13 of the Act is as follows: "After the market-place is opened for public use, every person other than a licensed hawker who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding forty shillings;" and by sect. 6 of the 34 & 35 Vict. c. 96 (1871), the above privilege is extended to pedlars holding a certificate.

(5) 6 B. & S. 303, 310.

(6) Law Rep. 7 Q. B. 690.

(7) 22 Ch. D. 294, n.

(8) 22 Ch. D. 287.

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of the local Act. The only other cases cited are *Elwes* v. *Payne* (1), and *Corporation of London* v. *Low* (2). In *Elwes* v. *Payne* two things were decided by the Master of the Rolls; one that a cattle market on Monday was *primâ facie* a disturbance of a Thursday market, the other that a system of auction, whereby the public are invited to come and sell goods by the agency of an auctioneer, and others of the public are invited to come and buy, if not technically a market, is as great a disturbance as a regular market would have been. This shews that nothing turns upon the name by which the thing we are setting up is called, and the whole question was left open by the Court of Appeal. The only two questions are—is what we are doing a disturbance? and do the Plaintiffs supply adequate accommodation? In *Corporation of London* v. *Low* the plaintiffs, who succeeded, relied upon the fact that they gave amply sufficient accommodation at *Islington*. That the Plaintiffs' market is not a monopoly market is shewn by the charters, and from the fact, proved by evidence, that the Plaintiffs have never attempted to interfere with sales of marketable commodities in the twenty or thirty shops or warehouses in the immediate neighbourhood of the market. In *Horner* v. *Oyler* (16 June 1880) (3), before *Field*, J., which was an action for unpaid tolls by the lessee of *Spitalfields Market* against one of his own tenants, the plaintiff succeeded, on the strength of an express covenant to pay tolls, not on the ground of disturbance. In order to constitute disturbance of a market without special monopoly, it must be shewn that the seller outside the market has taken fraudulent advantage of the concourse of buyers in the market: *Mayor of Macclesfield* v. *Chapman* (4). In this case, if there is any disturbance at all, it has been practised not only by the Defendants, but by numerous shop and warehouse keepers just outside the market, who have never paid any toll. That the duty of the lord to provide sufficient accommodation is correlative with his right, appears from the *Islington Market Case* (5), but it is said that where the lord has failed in his duty, you may only supplement his defect, you

(1) 12 Ch. D. 468.
(2) 42 L. T. (N.S.) 16.
(3) Unreported.
(4) 12 M. & W. 18.
(5) 12 M. & W. 20, n.

must not trespass on his rights. Even if that were so, the Defendants say that whilst all their arches have been freely taken up, there has been no diminution in the tolls of *Spital-fields Market*, and it is still inadequate. The case is absolutely governed by the decision in *Prince* v. *Lewis* (1). The nature of the business at the railway station is such that it could not be carried on by the Plaintiffs if the Defendants' arches had never been converted; hence there is no competition.

Colt, watched the case on behalf of the Board of Works for the *Whitechapel* district.

Sir *H. Giffard*, in reply:—

A distinction has been drawn between monopoly markets and non-monopoly markets. No such distinction is known to the law. Every market must to some extent be a monopoly. The nature of the grant of market is such that no other market can be lawfully established within its ambit. The question is, "Is the Defendants' establishment a market?" and the answer has been, "It is not a market, because it has not got market rights." How can it possibly have market rights? The defence labours under the mistake of assuming that the Plaintiffs' market is limited to a defined area. But this is not, as *Covent Garden Market* is, a market strictly limited to a defined area. Here there is no limitation of space, and the lord can hold the market where he pleases, "in or next to" *Spital Square*. As to the disturbance of the Plaintiffs' rights, the fact is proved conclusively by the Defendants themselves, who proclaim they can offer advantages which no others can, in superior accommodation, freedom from toll, and so forth; and by their witnesses, who have proved an enormous sale of marketable articles within 300 yards of the Plaintiffs' market. As to the want of accommodation, the answer is to be found in the judgment of Justice *Littledale* in the *Islington Market Case* (2). If want of accommodation will not justify the Crown in setting up a new market, *à fortiori* it will not justify a railway company in doing so. But here we deny that any insufficiency has been proved.

(1) 5 B. & C. 363. (2) 12 M. & W. 23, n.

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BACON, V.C.:—

This case has occupied a long time, and no doubt it is one of great importance to the parties concerned, but in my opinion it is reducible to very narrow limits.

The action is brought by the owner of property, who complains that his property is injured by the conduct of the Defendants—a very common topic and subject of dispute. The Plaintiffs are unquestionably owners, under the two charters which have been mentioned, of all the rights that can be said to belong to a market which is to be holden in or next to a certain place called the *Spital Square*, and those are the only limits within which the rights of the Plaintiffs can be said to be confined. Now what is that? It is a description of property vested in the Plaintiffs—vested by law. Their title to it is not disputed, even in this suit; nor is it capable of being disputed; and the point which the Plaintiffs submit to the Court is, that by what the Defendants have done, their market is disturbed—to use the ordinary legal expression—that is to say, their property is injured. That it is injured, the evidence is clear and plain. Whether what the Defendants have established is to be called a market or not, does not very much signify. If it did, the evidence upon the subject is most clear and distinct—I mean the evidence furnished by the Defendants themselves in that notice which they circulated from the *City Press*.

Now the statement of defence endeavours to get rid of what would seem to be a dangerous mention of the market, because they say in their statement of defence that the word "market" was used in a conventional, and not in a legal or technical sense. I have not heard in the course of the discussion any difference suggested between the conventional and popular use of the word "market" and the legal use of the word "market." What the technical sense of the word "market" may mean I do not profess to understand. But in the article in the *City Press*, which is one of great importance in the case, because it was circulated by the Defendants themselves, they announce—the date of this is the 14th of December, 1881—a project which at first seems to be "an infringement of the corporation's market rights"—that is, of the corporation of the city of *London*. They describe it as an area

of about four-and-a-half acres underneath the station, which they say is being made into "a fish, fruit, and vegetable market, for the reception and disposal of the immense quantity of fish caught on the Eastern coast, the large consignments of fruit imported from the Continent, and the abundance of potatoes and other vegetables which are produced in the Eastern counties." Then they point out the advantages. They state that "the difficulty of establishing new markets has been amply demonstrated in many instances;" and they then refer to the corporation of *London*; but they say "the *Great Eastern Railway Company's* successful venture in establishing a vegetable market at *Stratford*, though that is chiefly for roots, hay, straw, and cattle food generally, would seem to shew that when in connection with a railway terminus there is not much fear of a market's failure;" and, further on, they go on to describe how the market will be constructed. They say, "there will be four entrances to the market, two from *Brick Lane*, one from *Bethnal Green Road*, and the fourth from *Commercial Street* through *Wheeler Street*. These entrances will lead into covered ways running in front of the entire length of two rows of warehouses. The new market will have no claims to architectural beauty. The great aim in designing it has been utility, and to utility everything else has been subordinated." Then it disposes of the fish market, and then it says "The fruit and vegetable market" in the popular sense, I suppose, ".is to be similar in construction, and will occupy the arches to the south," and so on. "Between the fish market on the north, and the fruit and vegetable market on the south, will run three lines of rails," and then they describe how the market will be served. Then in another part of the same document they observe: "The remark with reference to saving of carriage on fish and the immunity from toll will refer also to a free vegetable and fruit market;" also that it will not be at all a matter of surprise if an impetus and development are also given to the fruit trade by the facilities to be afforded at this terminus for the disposal to retail traders of foreign fruit;" and it is suggested that there is "every probability of an abundant supply of a valuable article of diet at extremely moderate rates," and that "there will be daily services from *Antwerp* which will largely increase the

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fruit traffic." It further announces that the fruit and vegetable market will be ready for opening in three months. After that it seems to me very idle that I should be asked to consider whether the Defendants have or have not established a market. They said that they meant to establish a market, and that they have done. They equivocate and fence in their statement of defence, and say that it is not in a technical or legal sense that they used the word "market," and hence that they are not within the reach of the complaint preferred by the statement of claim. But the establishment is in every sense a market; and that is proved beyond contradiction, as well by the Defendants' own witnesses as by those of the Plaintiffs, that to this market wholesale and retail dealers in potatoes, costermongers, and other retail dealers, do resort constantly, and do there hold a market. That disposes of the suggestion which has been made; and there has been an attempt made to cover it by turning the dangerous word "market" into "depôt," which is at least a mere cavil, since in point of fact in the only sense in which the word "market" can be used, the Defendants do announce that they intend to establish a market, and it is proved that they have carried that intention into full effect; and that it is established in competition with the Plaintiffs' market is clear.

By law nobody has a right to establish a rival market, or to do anything else in the way of marketing which will interfere with the grant under which the Plaintiffs are entitled, and there is not a particle of evidence to question the fact that the Plaintiffs are entitled to a market in its fullest sense, whether conventional or technical, if any such expression can be applied to it, and that the Defendants have invaded that right.

A topic of defence has been that there is inadequate accommodation for the public. I have heard nothing that satisfies me of that. In point of fact I have heard a witness say, "When I go up there I find the place thronged on market days; I find it difficult to get my waggon in; the accommodation is not so much as I should like to have"; and I have heard in evidence also that in this *Spitalfields Market* (which I suppose is in *Spital Square*) there exists a set of buildings some of which are used as public-houses and for other purposes. It has been argued, because it is assumed

there is inadequate accommodation for the public, which is not proved, that therefore the Defendants have a right to take the law into their own hands, to grant themselves a charter for a market without any inquisition *ad quod damnum*, and have a right in short to destroy, or in some proportion to destroy, the value of the Plaintiffs' property. Now several cases were referred to, but there is no case that holds out the slightest justification for what the Defendants have done. If it be the duty of the lord to provide adequate accommodation, whatever that means, there is in the first place no evidence before me that he has not done that, but if it be proved that he has not done that, that does not justify the setting up of a rival market. The judgments in the *Islington Market Case* (1) shew clearly that if the public be damnified, if the lord has so neglected his duty as that the reasons which induced the Crown to grant the charter in the first instance no longer exist, there are means of preventing that. In *Prince* v. *Lewis* (2) the *Covent Garden Case*, which has been so often referred to, that subject is mentioned. There it is said by Lord *Tenterden*, then *Abbott*, C.J. (3), that if there was room in the market they ought to have given the man who was selling in *James Street*, notice, and therefore that man could not be complained of as having disturbed the plaintiffs' market. What authority is there for saying that any individual or corporation has a right to take the law into his or their own hands and say, "Inasmuch as you do not provide what I call sufficient accommodation, therefore I will set up a market and put an end to yours." The evidence of persons competent to give evidence upon the subject is, first, that there has been a diminution in the tolls, no matter to what extent; and, next, that in their judgment if the Defendants' market (for market it is and nothing else) is allowed to exist the *Spitalfields Market* will certainly be destroyed.

If there be reason for granting another charter for a market, or if by legislative provision or by the exercise of the royal prerogative, authority should be given to establish another market, that is another thing. In the meantime, no one here complains that there is any want of accommodation, as in the *Covent Garden Case*,

(1) 12 M. & W. 23, n.; 3 Cl. & F. 513. (2) 5 B. & C. 363.
(3) 5 B. & C. 370.

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where complaint was made, and that complaint was the subject of the decision. It does not appear here that the right of the public is in any respect interfered with or endangered.

With regard to the local Acts of Parliament, which have no kind of bearing on this case, I should observe that there is no parish in *London* that has not an Act establishing a paving rate or something of the sort, and I suppose there are very few of them which do not possess parliamentary powers to remove obstructions from before the fronts of houses, and so forth. But what has that to do with the right, as strong a right as if conferred by Act of Parliament, of the Plaintiffs to hold their market "in and near to" *Spital Square?*

Under these circumstances I think the Plaintiffs' case is perfectly well founded in law and justice, and the Defendants must be restrained from carrying on their market in the way they have attempted to do.

An injunction was granted in the terms of the claim as set out above, a part of the claim which went to restrain storage in the Defendants' warehouses being omitted. The Plaintiffs waived all claim as to damages. The costs of an interim injunction motion before Mr. Justice *Fry* were ordered to be included in the costs of the suit. At the request of the Defendants the injunction was suspended for one month, to give the Defendants an opportunity of appealing, they discontinuing their advertisements in the meantime. As to the costs of the shorthand writers' notes, the Court declined to make any order; and it was stated that an arrangement had been made.

J. B. D.

C. A.

From this judgment the Defendants appealed.

After the notice of appeal had been given the Defendants obtained leave to adduce fresh evidence of the invalidity of the letters patent under which the Plaintiffs claimed, and for that purpose to put in evidence any charter of the city of *London*, and any old plans of *Spital Square* and its neighbourhood, and to amend the pleadings accordingly. Leave was also given to the Plaintiffs to adduce fresh evidence of user by affidavit subject to cross-examination if the Court should think fit.

In pursuance of this order the Defendants put in evidence, among other things, a charter granted by King *Edward* III. in the first year of his reign (A.D. 1326) to the city of *London*, whereby the King, "with the assent of the prelates, earls, barons, and all the commons of our realm assembled in our present Parliament, convoked at *Westminster*," granted and confirmed to the citizens of the said city certain privileges as to devising their tenements, military service, appointment of officers, and taxation, and it then proceeded to grant "that no market within seven miles round about the aforesaid city shall be granted by us or our heirs to any one."

The Plaintiffs also filed an affidavit referring to various title deeds and old plans.

The appeal came on for hearing on the 11th of December, 1883.

Hemming, Q.C., and *A. Charles*, Q.C. (*Smart* with them), for the Appellants:—

The three main points on which we rest our defence are: First, that Plaintiffs never had a valid right of market; secondly, that assuming that the Plaintiffs had a right of market, the accommodation provided by them for the public was so inadequate that they cannot complain of any alleged disturbance; thirdly, that there has been no disturbance in fact of the Plaintiffs' market.

With respect to the first point, which was not argued in the Court below, we rely, in the first place, upon the charter of *Edward* III. to the city of *London*. That charter was something more than a grant from the Crown; it had the effect of an Act of Parliament, being made with the assent of the Parliament. This makes the charter of *Charles* II. absolutely void: *Prince's Case* (1); *Islington Market Case* (2). It may be suggested that the charter of *Charles* II. is good as against all persons except the city of *London* until it is repealed by *scire facias*. But that is not so. Advantage can be taken of the invalidity of the charter by third parties, although there has been no *scire facias*: *Comyns'* Dig., Patent (3); *Ib.* Prerogative (4); *The Monopolies Case* (5);

(1) 8 Rep. 1 a.
(2) 12 M. & W. 20, n.; 3 Cl. & F. 513.
(3) F. 1.
(4) S. (b) 114.
(5) 11 Rep. 84 b.

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Alcock v. *Cooke* (1); *Rutter* v. *Chapman* (2); *Gledstanes* v. *Earl of Sandwich* (3).

Then, with respect to the charter of *James* II., that was expressly repealed, with other charters of *James* II., by the Act 2 Wm. & M., sess. 1, c. 8. If, therefore, the charter of *Charles* II. can be supported, the Plaintiffs have, at all events, only a right of market on two days in the week.

Assuming that the Plaintiffs have a right of market, they cannot complain of the disturbance of it unless they provide sufficient accommodation for buyers and sellers. If the space of a market is unlimited, the lord of the market must acquire land sufficient for the purpose. If it is limited in space he must use it all: *Prince* v. *Lewis* (4); *Islington Market Case* (5); *Mayor of Macclesfield* v. *Chapman* (6); *Mosley* v. *Walker* (7); *Mayor of Northampton* v. *Ward* (8); *Rex* v. *Burdett* (9). The Plaintiffs have failed in their duty in this matter. Our witnesses shew conclusively two things; first, that there is no room for any sellers except those who have hired stalls and standing room from the Plaintiffs; and, secondly, that the Plaintiffs have reduced the space that ought to be used for the market by letting shops to publicans and tradesmen who do not deal in fruit or vegetables. On the other hand, they extend the market into the surrounding streets, which they are forbidden to do by 28 Geo. 3, c. lx., and 57 Geo. 3, c. xxix. It may be suggested that although the market be inadequate, so that the lord of market cannot complain of a person who sells outside the market, that does not justify a stranger in setting up a rival market. Our answer to that is, that we are not setting up a rival market. The owner of a market cannot prevent a person selling goods in his own shop unless he can shew special user for such a privilege: *Mayor of Penryn* v. *Best* (10). It makes no difference whether we sell in one shop or in a row of shops. The sellers in the *Bishopsgate* depôt are all our tenants. We invite buyers but we do not invite

(1) 5 Bing. 340.
(2) 8 M. & W. 1.
(3) 4 Man. & G. 995.
(4) 5 B. & C. 363.
(5) 12 M. & W. 20, n.; 3 Cl. & F. 513.
(6) 12 M. & W. 18.
(7) 7 B. & C. 40.
(8) 2 Str. 1238.
(9) 1 Ld. Raym. 148.
(10) 3 Ex. D. 292.

sellers, and although it is difficult to give a definition of a market, one qualification certainly is that it is open both to buyers and sellers. Nor have we established our depôt for the purpose of taking advantage of the concourse of people at the Plaintiffs' market, nor for the purpose in any way of defrauding the Plaintiffs of their tolls. The intention to do this is of the essence of a disturbance of market: *Fearon* v. *Mitchell* (1); *Elwes* v. *Payne* (2); *Blakey* v. *Dinsdale* (3); *Bridgland* v. *Shapter* (4); *Mayor of Brecon* v. *Edwards* (5). No one of our tenants could be attacked for disturbance while the Plaintiffs' market fails to supply accommodation, nor even if that defect was supplied. And if our tenant does not disturb by selling in his arch, we cannot be disturbers by giving him an arch to sell in.

Lastly, we say that in fact our depôt does no injury to the Plaintiffs. There is no proof that the tolls have been in any way diminished by it; and although some witnesses say that it may become injurious to the Plaintiffs; that is mere speculation, and it is more probable that it will bring custom to their market by facilitating the importation of vegetables from the country. At present their market is supplied almost exclusively by market-gardeners near *London;* our depôt is supplied by places at a distance from *London* on the line of our railway.

Sir *H. Giffard,* Q.C., *Cozens-Hardy,* Q.C. (*Micklem* with them), for the Plaintiffs:—

With respect to the validity of the charters, the market rights have been enjoyed under them for 200 years, and every presumption is to be made in favour of a lawful origin to them. Even an Act of Parliament may be presumed if necessary where the enjoyment has been long continued: *Lopez* v. *Andrew* (6). In *Piers* v. *Piers* (7) a special license for marriage from the bishop was presumed, though all evidence was against it. But in the present case it is not necessary to presume an Act of Parliament, for the charter of *Edward* III. was a grant of privileges to the

(1) Law Rep. 7 Q. B. 690.
(2) 12 Ch. D. 468.
(3) Cowp. 661.
(4) 5 M. & W. 375.
(5) 1 H. & C. 51.
(6) 3 M. & R. 329, n.
(7) 2 H. L. C. 331.

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city of *London*, which they had the power to waive. The *Covent Garden Market Act*, 53 Geo. 3, c. lxxi., recognises the validity of a charter which was liable to precisely the same objection as that now raised against ours; and in *Duke of Bedford* v. *Emmett* (1) the Court recognised it. The Act 35 & 36 Vict. c. lxxxii. s. 43, the *Newport Market Act*, is similar. A user of twenty-three years has been held sufficient for presuming a grant: *Holcroft* v. *Heel* (2), explained in *Campbell* v. *Wilson* (3). The latter case was discussed in *Dalton* v. *Angus* (4). There never was a more favourable case for the presumption; the market having been carried on largely for nearly two centuries close to the boundaries of the City. It is urged that the Act of 2 Will. & Mary repealed the charter of *James* II., but if it did, there was an interval of time enough to presume a grant. In favour of such long enjoyment every presumption not absolutely irrational is to be made.

The evidence of inadequacy of accommodation is insufficient to support the Defendants' case. The Vice-Chancellor, who had seen the witnesses, treated it as frivolous. The Plaintiffs are justified under their charter in extending the market as far as the middle of the surrounding four streets. The Paving Acts which have been cited have no application. They were not intended to interfere with existing rights.

But however inadequate the accommodation is, it is no defence to the present action. If a market is inadequate the Crown may interfere by *scire facias*, or a person who is prevented from selling by the crowded state of the market may be justified in selling elsewhere, but the charter may not on that account be disregarded by strangers. The Defendants cannot say that they are not setting up a rival market. The article in the *City Press*, which they adopted and circulated, shews their intention, and they and their tenants have in every way advertised the new depôt as a place where vegetables may be bought without the tolls payable in other markets. It was not meant for a mere depôt; if the tenants did not sell the goods as well as store them they threatened to turn them out. *Elwes* v. *Payne* (5); *Mayor*

(1) 3 B. & Ald. 366.
(2) 1 B. & P. 400.
(3) 3 East, 294, 298.
(4) 6 App. Cas. 740, 813.
(5) 12 Ch. D. 468.

of Macclesfield v. *Chapman* (1); *Corporation of Manchester* v. *Peverley* (2); *Mosley* v. *Chadwick* (3); *Mayor of Dorchester* v. *Ensor* (4); *Yard* v. *Ford* (5); *Pope* v. *Whalley* (6); *Fearon* v. *Mitchell* (7). If the acts of the Defendants have really the effect of injuring our market it makes no difference what their object may be; it is not necessary to shew a fraudulent intention. The injurious effect of the Defendants' depôt on our market cannot be doubted, whether we look at the evidence or the nature of the case.

Hemming, in reply:—

Lopez v. *Andrew* (8) was a very exceptional case; there is no other case in which the Court has presumed an Act of Parliament, and it is by no means clear that it did so there, and in *Attorney-General* v. *Ewelme Hospital* (9) it refused to do so, especially in a case where, as here, the origin of the user was shewn not to be an Act of Parliament. The whole current of authority, apart from a few *dicta*, is inconsistent with the notion that a lost Act of Parliament can be presumed—or at any rate with the idea that it can be presumed from the like evidence of user which suffices for the presumption of a lost grant. In all the cases, especially in *Dalton* v. *Angus* (10), the law uniformly laid down is that the presumption from user is limited to presuming some lawful origin. This limitation would be a mere absurdity if Acts of Parliament were to be presumed when necessary, for on that assumption an unlawful origin would be an impossibility. But whatever the theoretic view may be the Court will not presume an Act of Parliament, where the Plaintiff says and proves that his right arose not from statute, but from a royal charter. It is argued that the corporation of *London* may have consented to the establishment of the market; but their consent would not make an act legal which was otherwise illegal. The charter had the force of an Act made for the public benefit, and the enactments are peremptory. It contained grants of special

(1) 12 M. & W. 18.
(2) 22 Ch. D. 294, n.
(3) 7 B. & C. 47, n.
(4) Law Rep. 4 Ex. 335.
(5) 2 Saund. 172.
(6) 6 B. & S. 303.
(7) Law Rep. 7 Q. B. 690.
(8) 3 M. & R. 329, n.
(9) 17 Beav. 366, 390.
(10) 6 App. Cas. 740.

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privileges to the individual citizens with respect to military service, to taxation, appointment of officers, and other matters which the corporation cannot waive. It took away part of the royal prerogative, and no consent of the City nor anything short of a statute could restore it. Then as to the suggestion that the City must be presumed to have consented to the charter of *Charles*, it does seem absurd to treat this as possible pending the *quo warranto* then standing for judgment, by which the statute-charter of *Edward* III. was sought to be repealed, and was in fact soon afterwards repealed, or purported so to be.

COTTON, L.J. :—

This is an appeal against a judgment of Vice-Chancellor *Bacon*, whereby he granted a perpetual injunction to restrain the *Great Eastern Railway Company* from doing what they are now proposing to do, and are in fact doing, at what was formerly *Bishopsgate Station*, that is establishing what I may call, for the purpose of shortness, a depôt for the sale of vegetables and fish. The appeal was supported on several grounds. The first which we have to consider was not in any way before the Vice-Chancellor; it was a contention that the charters on which the Plaintiffs rely were altogether void. The charters upon which they rely are two charters, one granted by *Charles* II., and the other by *James* II. They stand, in my opinion, in somewhat different positions. The original grant of the charter—a franchise for the market—was by *Charles* II.; and then, subsequently there was a charter by *James* II.—cancelling one of the days appointed for the market, the original days being Thursdays and Saturdays, and adding other days.

The ground upon which the Appellants contended that both those charters were void, was this,—Under the leave given by the Court of Appeal, the Appellants produced a charter of *Edward* III., which had the effect of a statute, and was a grant to the corporation of the city of *London*. It is contended that under the words contained in that charter-statute, or statute-charter, whichever you please to call it, having the effect of an Act of Parliament, the Crown was prohibited from granting these charters to the Plaintiffs, and that they were null and void.

If there was a statutory provision in violation of which the charters were granted, it was conceded by the Plaintiffs that it was not necessary to take any proceedings to avoid the charters, and that the objection was a good one. The words in the statute-charter which were relied upon by the Appellants were these: "that no market within seven miles round about the aforesaid city shall be granted by us or our heirs to anyone." Reading that alone, it looks as if it was a prohibition by Parliament binding the Crown, and preventing the Crown from granting any such franchise as that under which the Plaintiffs claim. But we must look at what this is, and although it has the effect of an Act of Parliament, yet it is in the nature of a private Act of Parliament making a grant to the corporation of certain privileges. It begins, "The King, &c., with the assent of the prelates, earls, barons, and all the commons," and so on, "granted, and by this our charter have confirmed for us, and for our heirs to the citizens of the city aforesaid the liberties underwritten." Now, undoubtedly, "Citizens of the city aforesaid," must mean the corporation of the city of *London*. Then we have the words of grant, "We will and grant for us and our heirs that the same may have their liberties according to the form of the great charter above said," and so on. Then again, "We have granted moreover for us and our heirs to the same citizens," and so on, "that they and their heirs and successors may devise their tenements," &c. Then there are various other matters referred to beginning at what one might call in a deed a new witnessing part by those words of grant to the citizens and their successors. Then we find in another place, "Moreover we have granted for us, and our heirs, certain privileges;" and when we come more immediately to the passage that is relied upon, we have this, "Also we have granted that the foreign lands and tenements of the said citizens who have been or shall hereafter be officers of the aforesaid city shall be bound to save the said city harmless to us and our heirs in those matters which concern their offices;" and then we come to this, "And that no market within seven miles round about the aforesaid city shall be granted by us or our heirs to anyone." In my opinion we must take that sentence not as occurring by itself as a statutory prohibition, but as part

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of the liberties granted to the corporation of *London* in this charter, which is a grant to them, though a statutory grant, that is to say, having the effect of an Act of Parliament.

Could the corporation effectually waive the grant thus made to them? In my opinion, they could. There may perhaps be things in this charter, and I think there are, which the corporation could not waive,—but as regards this, which was a privilege granted to the corporation on behalf of all the citizens of *London*, I think it was a grant to the corporation, which the corporation being the persons recognised as representing the citizens might, if they thought fit, waive either altogether, or in any particular case; and if they did waive it, a charter might be lawfully granted by the Crown, notwithstanding this grant to the City, although it was of a franchise of a market within the seven miles limit.

Then what we have to consider is this, whether on the evidence which is before us, we ought to come to the conclusion that the City did waive their right to prohibit the granting of this franchise. Now, what took place was this: In 1681 *Charles* II. began to take proceedings to get rid of the City privileges, and there was a charter granted in 1682. We have not any evidence, and it is very difficult to get it now, of what was done immediately under this charter; but we have, from documents which have been produced, evidence that at a very early period in the eighteenth century there was a market here; for the deed and will, which have been produced, describe it as the "market-place," and one of them dated in 1723 refers to the market "then holden." I think the proper inference is this, that from a very early time, if not immediately after the grant of the charter of *Charles*, the grantees were exercising the franchise which that charter purported to grant to them. When *William* and *Mary* came to the throne, there having been a great attack made on the City privileges during the reigns of *Charles* and *James*, an Act of Parliament was passed, which interfered for their protection, and restored their right. At that time nothing was done whatever by the City for the purpose of having the charter of *Charles* II. (I will deal presently with the charter of *James*) annulled; and from that time to this, the City have never interfered at all for the purpose of preventing the continuance of that

which, if the Appellants' contention is right, was a violation of their privileges. In my opinion, we ought to come to the conclusion from that that the City really did assent to the charter being granted. We do not know what took place on the inquiry *ad quod damnum*, but from those facts which I have stated, in my opinion we ought to come to the conclusion that the City did assent. Very probably they may have thought that having this market for vegetables just outside the City was for the benefit of the citizens, and therefore that they were justified in waiving, and did waive the privilege which was granted by the charter of *Edward* III. It was said that it would be wrong to make such a presumption, and the case of *Alcock* v. *Cooke* (1) was referred to by Mr. *Hemming* and much pressed upon us. In my opinion that case does not support his argument. In *Alcock* v. *Cooke* the Plaintiffs were grantees of the Crown of a right to wreck, which was a privilege belonging to a certain lordship. At the time when that grant was made to the Plaintiffs it was found by proceedings in the Exchequer that there was an existing lease which was subsisting at the time of, and after the grant to the Plaintiffs; but the grant to the Plaintiffs was in terms a grant of a right in possession, and which would entitle the Plaintiffs, if it was to have its effect according to its terms, to immediate possession; and it was held that as there was an existing lease it was a grant which must have been considered as having been obtained from the Crown by the false representation of the grantee that the lease was no longer subsisting. That was a case where the blot would not be healed by shewing that the lessee had consented. His only consent which would have been effectual to make that which was in terms a grant in possession, in truth and verity a grant in possession, would have been a surrender of his lease. But that was negatived by the proceedings, which shewed that not only at the time when this grant to the Plaintiffs was made, but several years afterwards, the lease was still subsisting and in effect and force. That, to my mind, is the difference between that case and this. This grant to the Plaintiffs does not on its face contain anything that is false. It is one that could not be made without violation of the privileges of the City, unless they

(1) 5 Bing. 340.

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consented to waive those privileges; but if they assented to this grant, it could not be said, in my opinion, that the grant was open to the objection which was held to be effectual in that case of *Alcock* v. *Cooke* (1). In my opinion the charter of *Charles* II. ought to be treated as valid.

But the charter of *James* II. stands upon a somewhat different footing. There was a proceeding begun by *Charles* II. in the year 1681, the year before the charter of *Charles* was granted, in which judgment was not obtained until some time afterwards, cancelling the privileges of the City, and after the judgment in that proceeding a charter was granted by *James* II. Then there came the Act of *William* and *Mary*, which avoided all grants made by the Crown after the judgment in violation of the privileges of the City. Having regard to the judgment which was then existing, I think it would be wrong to assume that the charter of *James* II. was assented to by the City. It stands on a different footing, and therefore, although there is some doubt about the language, and although it was put by Mr. *Cozens-Hardy* that if the Appellants were wrong in their main contention, the second charter had not been granted in violation of the privileges of the City, yet, in my opinion, we must consider that the second charter—the charter granted by *James*—was put an end to and annulled by the Act of Parliament of *William* and *Mary*. And the only charter, therefore, upon which the Plaintiffs can rely is that original charter granted by *Charles* II. That may have an effect when we come to consider how far, if to any extent, the injunction which has been granted should be modified.

The Plaintiffs having a charter under which they are entitled to the franchise of the market—a market to be held "in or next to *Spital Square*," what are the Defendants doing? They have their *Bishopsgate Station* about 300 yards or less from *Spital Square*, and what they are doing there is this: They are not using that station for passengers. They have constructed what appears from the plan to be a most efficient market, using that word in general terms. They have turned their arches under the station into depôts for vegetables on the one side, and for fish on the other side of the line; and into each of these arches

(1) 5 Bing. 340.

or stalls there is a line of railway which brings the produce in waggons into each stall, and there deposits it without any cartage or difficulty of that kind. Then they have let all these stalls to salesmen and those who wish to sell either their own produce or the produce of others; and they give an opportunity not only to those people who have taken the stalls, but to every one who is willing to send produce by their railway, to have it sold it at this place; and they do not confine their stalls to produce which is brought up by their line, but they do in some instances, though I agree to a small extent only comparatively, take produce brought by sea, for instance, apples and fruit, and have it sold there. Then again they sent circulars round inviting people to come there, and calling it a market; and when they let these places to persons on monthly tenancies, they tell them that unless they have produce there, and unless they keep their shops open during business hours, that will not suit the purpose of the company, and that somebody else will be taken as a tenant, and they will be turned out. But it does not even stop there. Circulars were issued by those who had taken the stalls, and those circulars were sent round to a very large extent by the railway company, the object of the railway company of course being not only to get their stalls let, but also to get the carriage of the goods by their railway. Undoubtedly they charge no toll. They circulate those letters which were issued by the tenants of their stalls. Some of those, I think five or six, are persons who were before, or are now possibly, salesmen at the market held by the Plaintiffs. Some of these circulars are headed "market," but some are headed "depôt": the word does not matter much, but what they say is this, that having regard to the absence of cartage, and to the absence of toll, and to the facilities for vegetables being brought up, "this market," or "this depôt," "bids fair to become one of the best potato and fruit markets in *London*." That is what they are doing. The Defendants evidently have very great facilities. They can bring up the vegetables; and they can deposit there without injury from removal, and much more rapidly than any cart can bring them from the country, a vast quantity of vegetables which their tenants can sell to greater advantage and with greater facilities than those

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who sell at the market held by the Plaintiffs under this franchise. Now what we have to consider, to my mind, is this—I do not at the present moment go into the question of what is technically meant by disturbing the market—Is what the Defendants are here doing calculated to interfere with or injure the franchise to which the Plaintiffs are entitled? In my opinion that must be the consequence of it. Whether it has done so at present, very possibly may be a little doubtful, although there is some evidence of injury; but this depôt of the Defendants has only existed for a short time. We must consider what the effect and result would be. We know what the people there think—that it will become one of the most successful markets, and undersell other markets. In my opinion, that is the natural and almost certain result of the *Great Eastern Railway Company* establishing so near to the market of the Plaintiffs this depôt where they invite all the public to send and sell, and where they invite all the public to come and buy, holding out to them that they will be able to buy better, because there will be fewer charges upon the vegetables than those which have to be paid at *Spitalfields Market.*

But it was said that this was not actionable, however much it might interfere with the market, and that such an action as this is against the decided cases. In my opinion it is not. It is very true we have no case very like this, although we have been referred to cases something like it; but there is a difference between this action and an action by the lord of a market-franchise against an individual who is selling out of the market. There it is merely that the man is depriving the owner of the franchise of the benefit which the owner would get if he came to the market and subjected himself to the liability to pay toll. It is the purchaser who usually pays toll and not the seller, except in some cases—I think *Covent Garden* is one instance—and then it is by Act of Parliament that the seller pays. In such cases it may be that the Court was justified in saying that there must be a fraud on the market, namely, by the individual taking advantage of the concourse of the market, and selling so as to avoid payment of the toll; but the distinction is great, in my opinion, between such a case and a case like this. Here the Defendants are establishing a rival place of sale, (I will not use the word "market,") at which,

although there is not that which I think is necessary where there is the franchise of a market—a public place of resort for both buyers and sellers—yet they are not merely establishing shops, as was contended with great earnestness by Mr. *Hemming*, but they are doing something more. They are not acting as landlords who are using their land for the erection of houses which will be used as shops, but they are so using their land as to encourage and provide for a concourse of sellers and of buyers; and although the persons so selling there are their tenants, yet they are tenants under those special terms and obligations which I have mentioned; and they are sellers who sell not only their own produce, but who sell the produce of any one of the public who on their invitation, or on the invitation of the company who offer facilities for those who send goods to their depôt, are willing to send their goods there to be sold. Therefore if this is not, and probably it is not, technically a market, so as to be a sufficient market if there were a franchise granted, yet, in substance, it is setting up a rival place of sale in such a way as would injure and deprive the Plaintiffs of the benefit of their franchise; and this, in my opinion, is sufficient. It is not necessary it should be in fraud of the market, or that it should take advantage of the market; but, in my opinion, it is such an interference with the franchise that the owners of the franchise are entitled to come into Court and to say that this is an actionable wrong, and to get an injunction to restrain that invasion of their rights. We have authority for it, though I should not require authority, in the case of *Mosley* v. *Chadwick* (1), where all that was done by the Defendants was this—they had nothing which would be necessary for a franchise market; they only took money in the nature of rent for stalls which they had erected. It was very like the present case, although no doubt there was greater proximity to the market than in this case; and it was held to be an invasion. And there Lord *Mansfield* said the question was whether the action would lie, and the special verdict found there was a diminution of the profits of the Plaintiffs arising from the market to the amount of £90. The amount of the sum is not material. The great question which arose out of the special verdict was whether an action would lie by the

(1) 7 B. & C. 47, n.

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owner of a market against another who only made a rent of his own land applied to the use of selling, which was a lawful act, and did nothing that amounted to a usurpation of a franchise upon the Crown. It was held that the action would lie, because there was a concourse of buyers and sellers brought together there; and although the only benefit which the defendant got was the rent arising from his land, that was such an interference with the franchise market which on the evidence would cause damage or loss to the plaintiffs, so as to justify an action.

I may mention here an argument which Mr. *Hemming* pressed upon us very much. How can you say that these Defendants are doing anything which is actionable, when not one of the tenants could be said to be doing anything that is actionable? It is not the same thing. It may be here that each of these tenants is not defrauding the market so as to be liable as an individual for damage, or for the toll which he ought to have paid. But what the Defendants are doing is providing, by their land being arranged in a particular way, and by the facilities which they offer on their railway, for a rival concourse of buyers and sellers at their terminus; and that distinguishes the case of the Defendants from that of each of their individual tenants, and, in my opinion, makes the conduct of the Defendants actionable, even if it be the case that none of their tenants are so acting as to be liable as individuals for the toll or for the damage for non-payment of the tolls.

I must consider the other objections which have been much pressed upon us. It was said that there is an obligation on the owner of the franchise of a market to provide proper accommodation for those who wish to buy and sell. Mr. *Hemming* put it somewhat higher; but it must be for those who are reasonably expected to come, and who do practically come to the market. That is the obligation. This obligation would stand in a very different position if the action was against any one selling outside the market, and in fraud of the market, and an action against the Defendants, because the cases establish this: that in a case where the franchise is not such as to prevent sales on market days in the shops or elsewhere, if a man willing to come into the market is unable to come there, he then has a

reasonable excuse for selling outside the market; and, in an action against him individually, it is an excuse to say, "Yes, I was willing to come in, but there was not room in your market, and therefore I sold outside." One case goes to this: that if a man generally found there was no room, then he could not have an action brought against him for selling outside, when he reasonably thought there was no room, unless the owner of the franchise had given him notice that in fact there was room. But that would be an action against an individual. As regards the Defendants, what they are doing is this. They are not by an individual sale depriving the Plaintiffs of the tolls, or other benefits which they are entitled to receive from sales in the market; but they are setting up a rival depôt for sale, the consequence and the result of which will be, in my opinion, if allowed to go on, that the Plaintiffs' market will disappear or dwindle down to very small proportions; and although, if it were shewn that there was a want of accommodation of a definite amount, and that almost always there was a further amount of accommodation required which was not provided by the Plaintiffs, it might perhaps be that a market providing only for that deficiency would not be unlawful; yet that is not what the Defendants are doing here. They are establishing a place for sale without limit, and with the result and natural consequence that if they succeed they will really not only provide for the deficiency, if any, but give greater facilities, and ruin the Plaintiffs' franchise. I must say that I am not satisfied on the evidence here that there is that deficiency on which the objection was founded. Of course the very idea of a market is that it is a place which will on market days be crowded; and if it was not, I should think the owners of the franchise would get very little from their franchise. Here it is remarkable that we do not get any one who says, "I wanted to go into the market, and I could not get a standing place." One witness does say, "I wanted a place reserved to myself, and a place next to it—not a stall, but a standing place—and I could not have it"; and it does appear that a great many of those that came to the market pay either weekly or monthly for standing room; that is to say, for a place to let their carts or vegetables stand without any stall or cover. It is a full market, I have no doubt very full; but if

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we are asked to come to a conclusion on that part of the evidence in the case, I should not come to the conclusion that there was such a deficiency here as would justify the Defendants on market days in setting up this rival depôt, or market, for the sale of similar goods.

I may mention one matter here, which is this: the accommodation at present afforded by the Plaintiffs—crowded I agree—includes not only the central square, which one would call the proper market, but it includes the streets—*North Street*, *South Street*, *East Street*, and *West Street*—which run from the main street between houses erected by them into the central market; and they also have a market carried on, and they claim tolls for carts standing, in the main streets which run round the block, the centre of which is the market square. It was said that a great part of that is illegal, because it is not in the charter. As I understand the charter, it does not limit the Plaintiffs to even that which was their own property, The market is to be held "in or next to *Spital Square*;" and if they acquired land where they could have put the market, they had, in my opinion, perfect liberty to do so.

Then reliance was placed on some Acts of Parliament passed in the reign of *George* III., for regulating the streets of this district. They are paving Acts; and it is very true that in those Acts of Parliament there are prohibitions against letting carts stand, and putting down vegetables and other things upon the streets. It was contended that these applied to those four streets which intersect the block of buildings, the centre of which is the market square, and that treating that as a market place was therefore illegal. In a passage which I read the other day from Lord *Tenterden*, it was said in a former time that formerly all markets were holden in the public streets. Of course, without a franchise authorizing it, that would have been treated as a nuisance and illegal; but when there was a franchise granted for holding a market, what was done for the purpose of exercising the franchise which had been granted by the Crown, was considered as a reasonable use of the street—of the public thoroughfare. As I understand those Acts, they were not intended in any way to make that illegal which was not illegal before, but simply to

give to those in whom power was vested by these paving Acts, a summary means, and providing a summary penalty, for preventing those who, without lawful reason and without lawful excuse, were doing those acts in the streets which were prohibited; so that, in my opinion, that left the rights of the Plaintiffs as they were before those Acts. It left them at liberty to carry on their franchise, even although they might be in some of the streets within the jurisdiction given to the Commissioners by those Acts. Therefore that objection does not assist the Appellants here.

On the whole, I am of opinion that in substance, the decision of the Vice-Chancellor was right. It will be better that the other members of the Court should give their judgments before we deal with the question whether there should be some modification in the injunction, so as not to secure the Plaintiffs in the exercise of the market on days which are not authorized; or to give them a greater right in respect of their market than that to which the franchise entitles them.

LINDLEY, L.J.:—

This case was begun some time ago, and in the interval I have taken the opportunity of looking into the authorities on the subject of markets. I cannot find anywhere a definition of a market, and I certainly do not propose to try to give one. But without venturing to define what a market is, I think I can see my way plainly enough in this case to arrive at a conclusion, and to concur in the judgment which has been already pronounced.

There are several points of interest and of difficulty which have to be considered. The first is the true nature of the charter or statute of *Edward* III. I have read that statute with care, and it appears to me to be exactly that which it purports to be—a grant of privileges to the city of *London*. I think it is that from beginning to end, and, looking at it in that light, I cannot so construe it as to hold that it was incompetent on the part of the Crown, with the consent of the city of *London*, to grant a market within the limit which is there specified. I certainly do not understand that the Judges in the *Islington Market Case* (1) expressed a different opinion upon the true construction of that Act of Par-

(1) 12 M. & W. 20, n.; 3 Cl. & F. 513.

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liament. Their attention was not called to it from the point of view from which we have to consider it. They were there considering a case in which the corporation were opposing the erection of a market within the limits mentioned in the Act; and the whole of that judgment, so far as it turns upon the true construction and effect of the Act of *Edward* III., appears to be governed by that consideration. We have to look at the matter from a totally different point of view; and it appears to me, that the true view of the construction and effect of that Act of *Edward* III., is what I have above stated

That being so, we must look a little further at the charters of *Charles* II. and *James* II. The charter of *Charles* II. has granted this *Spitalfields* market. The charter of *James* II. confirms that, and adds another market day. The charter of *Charles* specified the market days to be Thursday and Saturday, and the charter of *James* adds Monday and Wednesday in place of Thursday. Now, there is no evidence that I can see which would authorize or justify the Court in coming to the conclusion that the city of *London* have assented to the charter of *James* II., and it does appear to me that upon the true construction of the Act of *William and Mary*, to which we have been referred, the charter of *James* II. must be considered as wiped out and cancelled. The charter of *Charles* II. is not cancelled in terms; it is plain that it is left, and that alone strikes me as significant. The statute of *Charles* II. has been acted upon, in fact, ever since it was granted, so far as we have any information about it. There is no sign of any dissent on the part of the corporation to the holding of this market in *Spitalfields*. There are circumstances, I mean the recital of the inquisition *ad quod damnum*, in the charter of *Charles* II., which lead one to suppose that the City had notice, at all events, of that charter; and user would not only justify us, but, to my mind, compel us to infer that the City had assented to it. It appears to me that it would be a very strong thing not to draw that inference from the facts, not having recourse to any violent presumption of an Act of Parliament; which is a strong thing to do, because, as Mr. *Hemming* says, if you presume an Act of Parliament, there is an end of all illegality which is of long standing. But I see no violence in

assuming what is highly probable, viz., that the establishment of this market was, in point of fact, beneficial; and in inferring that the City were content to let it be established, and assented to it.

It is said that we cannot infer this, because of the case of *Alcock* v. *Cooke* (1). The facts however are entirely distinct. In the case of *Alcock* v. *Cooke*, the Court could not consistently with the facts infer the consent of the first lessee. He had not surrendered his lease. If he had, then I apprehend the decision would have been different. But he, instead of surrendering his lease, continued to enjoy it, and it would have been ridiculous to infer that he had assented to surrender that which he continued to hold and enjoy. The facts of this case on the other hand are consistent only with the consent of the corporation to the holding of this market. There is not the slightest sign of anything else. Therefore it appears to me that the Plaintiffs have succeeded in establishing their right to this franchise under the charter of *Charles* II., and not under the charter of *James* II.; that is to say, they have succeeded in establishing a right to hold a market in or near *Spital Square*, on Thursdays and Saturdays.

The next point which I will touch upon is this, whether the Plaintiffs' franchise is in any way destroyed or affected by the Paving Acts. Now, I wish to be cautious about this, because I am told there is another action about these Paving Acts, and I do not wish to say more than this: that on the evidence before us in this action I cannot come to the conclusion that those Paving Acts have destroyed this power. There is not a word about the market in them, and it appears to me that upon the present materials—I wish carefully to guard myself—it would not be a right construction to hold that the Paving Acts had destroyed the right of the Plaintiffs to hold the market in those streets. That leaves the matter, so far as the Plaintiffs' rights are concerned, where it was, or in other words, on the charter of *Charles* II.

The next point is this: Have the Defendants disturbed the Plaintiffs' market—that is to say, have the Defendants infringed the rights of the Plaintiffs? We cannot say that the Defendants have disturbed the market or infringed the rights of the

(1) 5 Bing. 340.

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Plaintiffs unless we know what the Plaintiffs' rights are under their franchise; and there we come to the difficulty of finding out exactly what a market is. But without giving any definition of a market the authorities shew that the grantee of a market has some exclusive rights, and those exclusive rights, without attempting to define them positively and negatively, include an exclusive right of inviting the public to come and buy and sell in the place where the franchise has authorized the market to be held. Another exclusive right which is conferred by the grant of a market is a right of holding a Court of record, and there are some other rights which one need not enumerate now, but which are to be found specified in the books. Those are, amongst others, whether they are exhaustive I do not know—the rights of the grantee of the franchise of a market. Now, have those rights been disturbed? The first question we have to consider is this: Can a man disturb a franchise who does not himself pretend to have got one? in other words, who does not usurp those exclusive rights which are conferred upon the grantee of a market? This question is decided in the affirmative. There is plenty of authority to shew that a man may disturb a market without pretending to have got a market himself in the sense of having got a franchise. Amongst other cases which settle that there is, the case of *Yard* v. *Ford* (1), which is a leading case upon the subject, and *Mosley* v. *Chadwick* (2), and *Mosley* v. *Walker* (3), and the *Corporation of Manchester* v. *Peverley* (4), in none of which did the defendants set up a market in the sense of a rival franchise. In every one of those cases however the defendant was held to have disturbed the plaintiffs' exclusive rights of market.

Having got so far, we next have to consider what kind of acts will disturb this franchise. It is not necessary, as I have said (the authorities are conclusive upon that), that the Defendants shall claim to have a rival exclusive right of market. But we come to other difficulties which are considerable. On the one hand, speaking generally and apart from any special circumstances, a man does not disturb a market simply by having a shop near it, and selling in that shop goods which are similar in

(1) 2 Saund. 172; S C. 1 Lev. 296.
(2) 7 B. & C. 47, n.
(3) 7 B. & C. 40.
(4) 22 Ch. D. 294, n.

their nature to those sold in the market. That seems well settled. On the other hand, I apprehend it is also settled by the cases to which I have alluded, and especially by those cases of the *Corporation of Manchester* v. *Peverley* (1), *Mosley* v. *Chadwick* (2), and *Mosley* v. *Walker* (3), that any one does disturb a market who keeps a place sufficiently near to it to affect it, and who invites the public to come and sell and buy there. What the Defendants are doing here appears to me to be a plain disturbance of the Plaintiffs' market. I do not rely upon the fact that they advertise the place as a market. Market is an ambiguous expression, and nothing turns upon what they call it. The question is what they do. I do not understand that they have ever varied from their intention to do that which they say they have a right to do. What is it? It is inviting all the public within reach of their railway to send their goods to these arches by rail for sale, and for sale through the instrumentality of tenants of the arches—middle men who are salesmen—and they are also inviting the public to come and buy. That is really what they are doing; and the evidence, I think, shews conclusively that if that does go on, the result will be that it will ruin the Plaintiffs' market. I do not see that there is any actual proof now of any money loss. I do not know that there is. One can see for oneself what the inevitable consequence of it will be, and I think the Defendants, to do them justice, do not deny that the effect of what they are doing will be to withdraw the custom from this market to a great extent, if not wholly. When you come to look at it closely, they are clearly inviting the public to come and buy, both wholesale and retail, and they have provided accommodation for the purpose. There is a nice wide place, and accommodation for carts and barrows, and all sorts of things to accommodate the buyers. Have they invited the public to come and sell? It appears to me that they have; because the lessees of these arches, who are tenants, are not to sell simply their own goods, but they are to sell everything which is consigned to them by the real sellers of the produce who are invited to send. The Defendants invite the public to send their goods in to sell through

(1) 22 Ch. D. 294, n.
(2) 7 B. & C. 47, n.
(3) 7 B. & C. 40.

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the instrumentality of the holders of these arches. I do not mean to say this is not a very beneficial thing. It strikes me that it is highly beneficial for the public in the East End of *London* that this should be done. The question for us is one of law, whether the Defendants are not infringing the exclusive rights of the lord of *Spitalfields Market*. It appears to me that they are, and that they are disturbing the market.

But that does not quite exhaust the case. There is one point left, and a very serious one, and it is this: whether the Plaintiffs have by their conduct precluded themselves from obtaining the relief they seek. That part of the case is by no means free from difficulty, but it appears to me that we ought not to hold that the Plaintiffs are by their conduct debarred from obtaining this relief. The way in which it is put is this: It is contended that the Plaintiffs have by their mode of dealing with their own property, by building houses, and by letting out shops and by letting out stalls, precluded the public from coming to sell. Now it does appear to me that there is a great deal to be said in support of the allegation that this market is not sufficient for the accommodation of the population which has grown up around it. In order to accommodate the public demands, the Plaintiffs sell there every day instead of twice a week; and if they limit themselves to selling twice a week, I doubt very much whether this market would be sufficient for the supply of the public that come and sell and buy. I will not examine the evidence on this point, I will assume that it is made out. Does it follow that the Plaintiffs cannot obtain an injunction against those who set up a rival market? That is a point of law, and one upon which I should have felt very great difficulty, if I had not got the assistance and the opinion of the Judges in the *Islington Market Case* (1). The Judges in the *Islington Market Case*, in answer to the fifth question put to them by the House of Lords, draw a distinction between a market which is limited by metes and bounds, so as not to be expansible, and a market which is not so rigidly circumscribed. Now this is a case, I think, which falls under the latter category. It is not rigidly circumscribed. It is "in or next to," and it seems to me to fall more within the case considered by the Judges

(1) 12 M. & W. 20, n.; 3 Cl. & F. 513.

when they are answering the third and fourth questions than the case which they are considering when they are answering the fifth question. If I am right in that respect, the *Islington Market Case* (1) is a decision in favour of the Plaintiffs; because what the Judges say with respect to a market which can be more or less expanded, or more or less amplified, according to the wants of the public,—after alluding to the inability in certain cases to sue anybody who comes and sells his goods outside the market without giving him notice that there is room for him inside,—is this: "a second consequence would be that this breach of public duty on the part of the grantee of the franchise might, unless these inconveniences were removed, and a sufficient space restored for the accommodation of the public, operate as a forfeiture and furnish a ground for a *scire facias* to repeal the patent by which the market was granted." Then there is a suggestion that possibly an indictment might lie, and then the Judges go on in this way: "But these are the only consequences of such a breach of duty;" and then they go on to say that the Crown could not, without a *scire facias*, grant a rival franchise even in that case. Now if the Crown could not grant a rival franchise even in that case, it must be because to grant such a rival franchise would be infringing upon the exclusive rights of the lord of the market; and if the grant of the franchise would be an infringement of his rights, it appears to me that setting up a rival market without that grant is also an infringement of those rights. This part of the case is the most difficult of the whole, to my mind; but, having regard to the judgment to which I have referred, and assuming the market to be more insufficient than perhaps the evidence shews, I do not see my way in point of law to say that the Plaintiffs have forfeited their charter by such misuser or non-user as to deprive them of the right to have an injunction to stop that which is a rival market—not in the sense, of course, of a rival franchise—but of a rival place to which the public are invited to come and buy and sell.

For those reasons, it appears to me that the Plaintiffs have made out their case, although a little care will have to be taken in framing the injunction, so as not to restrain the Defendants

(1) 12 M. & W. 20, n.; 3 Cl. & F. 513.

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to a greater extent than the exclusive right of the Plaintiffs entitles us to restrain them.

FRY, L.J.:—

It is not without a certain regret that I concur in a decision which will probably diminish the supply of vegetable food to the East End of *London*. But the question before us is not whether that supply is desirable or no; but whether the rights of the Plaintiffs have been interfered with. The Plaintiffs, as all who hear me probably know by this time, claim under a charter of *Charles* II., dated in the year 1682; and the first objection made to their title is this: it is said that the earlier charter of *Edward* III., which had the operation of an Act of Parliament, rendered the charter of *Charles* II. void.

I approach this subject by observing that the true inference from the evidence appears to me to be that from the charter of 1682 down to the year 1883, the market has been held in accordance with that charter. It appears to me that, looking at the map of 1706, in which this large piece of ground is defined by a name which it must then have acquired of *Spital Market*—looking at the evidence of the usage, which begins in 1723, and of the subsequent usage, the true inference is that from the date of the grant of the charter down to the present hour, the Plaintiffs and their predecessors in title have enjoyed this market. It is noteworthy that, if the Corporation of *London* had any right to insist that this market was invalid, they might in all probability have exercised that right with great chance of success after the Revolution of 1688, when, as we all know, their privileges were restored by Statute, and when their influence and power were very great. It is further to be observed that more than 100 years ago an Act was passed for the purpose of putting down nuisances within this parish; and that it does not appear that from the passing of that Act until very recently, anybody attempted to say that the holding of this market was a nuisance which ought to be put down under the powers of that Act. Therefore, neither the City nor the local authorities, who might respectively have interfered with this market if it had not a legal origin, have attempted to do so until very recently.

I think it is not to be forgotten that there is in evidence before us the fact that no less than three other markets in what is now commonly called *London*, certainly within seven miles of the ancient city, are shewn to have existed under charters of *Charles* or *James*.

Now those being the facts with regard to possession, it appears to me that we are bound to make every intendment, every presumption which we reasonably can make, in support of the usage under that charter. That drives me to consider whether the presumption of the consent of the City can be made under the circumstances, and that turns on the inquiry whether the charter of *Edward* III. is really a public Act of Parliament, or whether it is a statute giving particular rights to the City which the City in certain cases may by consent waive. It appears to me to be plain that the whole of the charter of *Edward* III. is a grant of liberties to the City. It begins with this: "The King," and so on, "know ye that we for the advancement of our city of *London*, and for the good and commendable services," and so forth, "have granted and by this our charter have confirmed for us and our heirs to the citizens of the City aforesaid the liberties underwritten. To have to them, their heirs and successors for ever;" and then follow the grants of particular liberties and particular rights. It is quite true as was urged by Mr. *Hemming* that some of those rights may be held by the City in trust for others—in trust either for particular officers of the City, or in trust for particular classes of citizens. But that does not affect the right of the City in the case where the grant is really for the benefit of the City exclusively. That appears to me to be the object of that portion of the grant which is comprised in the words, "No market within seven miles round about the aforesaid city shall be granted by us or our heirs to anyone." I think, therefore, looking at the long usage which is shewn to have existed under the charter of *Charles* II., looking at the fact that an inquiry *ad quod damnum* was taken before that charter was granted, and looking at the fact that the City has never interfered with the existence of this market from the time of that grant down to the present hour, we are at liberty, and therefore are bound to hold that the consent of the City to

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the charter must have been given, which consent, in my judgment, made the charter of *Charles* II. valid.

The second point which has been urged before us is this. It has been said in reply, though I think it was not put forward in the first instance, that the Act of 1772 for the paving, cleansing, lighting, watching, and regulating of places within the parish of *Christchurch* in *Middlesex*, put an end to the right of market if it existed. Now I do not desire to express a more definite opinion than is necessary for the decision of this case on the construction of that Act, because there is a pending action which I understand turns upon the construction of the Act. But it does become necessary to determine whether or not that statute has put an end to the Plaintiffs' rights. It is material to consider what was the object of the statute. The recital is, "Whereas the squares," and so forth, "within the parish of *Christchurch* are not properly paved, nor sufficiently cleansed, and are in general greatly obstructed by sundry nuisances." Then the preamble goes on to recite that "it would be a great benefit and convenience to the inhabitants if powers were given for removing all nuisances and obstructions therefrom," and so on. I conceive the Act therefore to have had the object of giving greater facilities for the suppression of nuisances, that is to say, obstructions to the highway, or other public rights which then existed, or might thereafter exist; but the object of the Act was not to interfere with existing rights. It is plain that the right to obstruct the streets, which is incident to the existence of a market, cannot for a moment be considered as a nuisance. I think the object of the Act was the more easy enforcement of existing rights, and the removal of existing wrongs, and not to alter the rights of parties.

The next objection which is raised to the Plaintiffs' title is this: It is said that by reason of the buildings which have been constructed upon the site of the market, and for other reasons, the market is insufficient to accommodate those persons who desire to sell in the market, and that thereby the Plaintiffs have lost their right of suing the present Defendants.

Now, in the first place, in my judgment it is not proved that the Plaintiffs' market is insufficient for the accommodation of those persons who desire to come thither and to sell. It does not

appear to me that the inquiry is whether the *Spital Square Market* is adequate for the supply of the whole area of seven miles round *Spital Square*, but whether or no persons have come thither who desired to sell there, and have been unable to get accommodation there. It appears to me that the evidence does not support that contention. But even if that were made out, it is not, in my judgment, an answer of which the Defendants can avail themselves, because it appears to me that the only person who can avail himself of such a defence in the case of a market like this, to be held not within defined limits, is the person who has himself been turned back from the market because there was not sufficient accommodation for him. Now that I understand to be the principle of the decision in the case of *Prince* v. *Lewis* (1). There Lord *Tenterden*, at the end of his judgment, sums up what I understand to be the principle of his decision. He says, if the lord wishes to bring an action against any person for not selling in the market, he must first shew that there has not been such an appropriation of the space allotted to the market as excludes that person from the market. The Judges when they came to consider the market rights in the *Islington Market Case* (2) took precisely the same view of the decision in *Prince* v. *Lewis*: for the Judges there said this: First, there would be a good defence to an action brought by the grantee of the franchise against any person for selling out of the market to the prejudice of his rights, provided that such person had been prevented from selling in the market by the want of convenient room. I think that the same principle is really involved in the decision of the case before Lord *Mansfield* in *Mosley* v. *Chadwick* (3), because there it was found that stalls were not adequate for the butchers who resorted to them, and nevertheless the Court thought that the Defendant, who was not shewn to have desired to sell in the market, and to have been refused, had committed a wrong which was actionable. I think, therefore, that the objection of want of sufficient space in the market lies in the mouth of the person who has himself experienced that insufficiency, and has been unable to sell when he has wished so to do, but that it does not lie in the mouth of

(1) 5 B. & C. 363. (2) 3 Cl. & F. 513.
(3) 7 B. & C. 47, n.

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another person. I think that if *A.* has been turned back from a market because there is no room, he can defend himself; but that the turning back of *A.* does not justify *B.* in selling elsewhere than in the market.

The next point which arises is this. It has been contended that the only cases in which a market has been held to be disturbed are cases in which the defendant has done something, as it has been said, in fraud of the market, in which, without going within the limits of the market, he has availed himself of the concourse of the market. He has got the benefit without the burden of the market. I suppose the argument owes its origin to a note which I find appended to the case of *Prince* v. *Lewis* (1), in which the reporter suggests that in order to maintain an action of this nature "it seems to be incumbent on the plaintiff to establish that the defendant fraudulently sold goods near to the market out of its limits in order to avoid the toll." In my judgment that suggestion, if it is intended to apply to all cases of actions for disturbance of markets, is not well founded. I think that the case of *Yard* v. *Ford* (2) is as distinct an authority to the contrary as can be required, because in that case the plaintiff's market was held in *Newton Abbott*, the defendants' market was held in the town of *Ashburton*, the one was held on the one day, and the other was held on another day; so that no person could suppose himself going on one day into *Newton Abbott* when he was really going on another day into *Ashburton*. Yet the Court had no doubt but that there was in that case a disturbance of the plaintiff's franchise. I think again that a number of the other cases, especially those cases in which an auctioneer has established something in the nature of a public market, are strong to shew that there is no need whatever of fraud upon the market in the sense to which I have referred.

I then come to the inquiry which has been to my mind the most important in this case. Has there been, in fact, a disturbance of the Plaintiffs' market? In the first place, I must bear in mind that the learned Judge who saw the witnesses, who was able to give due weight to their evidence, which the person who sees the witnesses can give better than another who has not, has found,

(1) 5 B. & C. 363. (2) 2 Saund. 172; S. C. 1 Lev. 296.

as a matter of fact, that there was a disturbance of the market; and I confess that the evidence of some of the witnesses leads me to the conclusion that there has been even at the present time an appreciable injury done to the Plaintiffs' rights; and looking at the powers and resources of the Defendants, I cannot doubt but that injury will go on increasing, and I believe greatly to the detriment and disturbance of the Plaintiffs' market. No doubt it is not easy, and I am glad it is not necessary, to determine what is a disturbance of the market. It is enough in this case to say that in my judgment there has been a disturbance of the market. Where the alleged disturbance is the mere competition of a man who sells his own goods in his own shop, the case certainly is either a very weak one or it is probably no disturbance at all; but, on the contrary, where a man invites the public, or a large section of the public, to buy and sell upon his soil the marketable commodities and no others—when that land is in near proximity to an existing market—when the owner of the land carries into effect a general scheme for the convenience and facility of buyers and sellers of those articles—when he takes measures to produce that concourse of people, which is an incident of a market, and when he takes measures to enable them, as Lord Justice *Lindley* has especially pointed out, to bring from a large area of country the produce to be sold on that particular spot, it does appear to me that he approaches towards the disturbance of the legal market in his immediate vicinity.

In this case, as I have already observed, the evidence satisfies me that he has not merely approached to disturb, but has passed the line that separates disturbance from non-disturbance. I think, therefore, that the judgment of the Vice-Chancellor was substantially right, and that the Plaintiffs are, under the charter of *Charles* II., entitled to the market rights thereby granted.

With regard to the charter of *James* II., I will only add that I concur in the view which has been taken by my learned brethren. I think that that was avoided by the statute of *William and Mary*, but that the existence of that statute does not in any way prevent the Plaintiffs falling back on their earlier rights.

COTTON, L.J.:—

The judgment will be this: Vary the judgment of the Vice-

C. A. 1883

GOLDSMID v. GREAT EASTERN RAILWAY CO.

Chancellor except the last two paragraphs, and as varied let the judgment stand as follows: declare that the Plaintiffs, and others claiming under the charter of the 34th *Charles* II. are entitled to two markets every week, namely, on Thursdays and Saturdays, for the sale of fruit and vegetables, to be held in or next to *Spital Square*, in the parish of *Stepney*, in the county of *Middlesex*; restrain by perpetual injunction the Defendants, their directors, servants, agents and workmen from establishing a fruit and vegetable market at *Bishopsgate*, and from using, or permitting to be used, any portion of their station or railway there in any such manner as to interfere with and prejudically affect the rights of the Plaintiffs to the said market as hereinbefore declared, and also from advertising, or causing to be advertised any portion of their station or railway at *Bishopsgate* as a market, or as a place used, or to be used in any such manner as to interfere with, or prejudicially affect the rights of the Plaintiffs as hereinbefore declared. Then come the costs of the appeal. Although we have varied the judgment in some respects, it has been in consequence of what was not before the Vice-Chancellor, and in substance the Appellants have failed. In my opinion, they must pay the costs of the appeal.

Solicitors for Plaintiffs: *Waterhouse & Winterbotham.*
Solicitor for Defendants: *W. F. Fearn.*
Solicitor for *Whitechapel* Board of Works: *A. Turner.*

M. W.

RUSSELL *v.* WATTS.

[1880 R. 1100.]

C. A.
1882
V.-C. B.
June 22, 27, 28.
C. A.
1883
Nov. 19, 20; *Dec.* 21.

Easement—Implied Reservation—Notice—Building Scheme.

J., upon land held by him under separate leases of the same date from the same freeholder, commenced the erection of a large building for the purposes of his drapery business. This building was so constructed that it was capable of being divided into separate blocks (A, B, C, &c.), substantially corresponding to the separate leases, but partly dependent on each other for light and for facilities of access from one floor to another, and other *quasi* easements. While the building was in course of erection *J.* mortgaged block C to *X.*, who had notice of the general scheme of construction, and stipulated that *J.* should complete the part comprised in his mortgage in accordance with the plans; afterwards *J.* mortgaged block B to *Y.*, and also mortgaged other blocks to other persons. *J.* subsequently became bankrupt, and orders *nisi* for foreclosure were on the same day obtained by *X.* and *Y.* against the trustee in bankruptcy and mesne incumbrancers. *Y.* first completed his foreclosure absolute, and *X.* did so shortly afterwards. The openings between the blocks were stopped up and the blocks became separately occupied:—

Held, reversing the decision of *Bacon*, V.-C. (*dissentiente*, *Lindley*, L.J.), that there was no implied reservation of light to block B from the adjoining blocks, and that the owner of block B could not maintain an action to restrain *X.* from obstructing the light from block C:

Held, by *Lindley*, L.J., that the building of the several blocks was all one transaction, and that there was an implied grant of light to block B from the adjoining blocks.

Wheeldon v. *Burrows* (1) followed.

THIS was an action to restrain the Defendants from obstructing the access of light to the windows of the Plaintiff's hotel, called *Compton Hotel*, and forming part of a large block of buildings in *Liverpool*, called *Compton House*, of which the Defendant's premises also formed part.

Prior to 1866 *J. R. Jeffery* had gradually acquired, partly as owner in fee simple, and partly as lessee under renewable leases, from the corporation of *Liverpool*, a large plot of land now occupied by *Compton House*, and then covered by shops and buildings used by him for the purposes of his business as a wholesale draper and general dealer. In December, 1865, a fire

(1) 12 Ch. D. 31.

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took place which destroyed nearly all these buildings, and in March, 1866, *Jeffery*, in consideration of a surrender of the leases then held by him, and a conveyance of that portion of the land of which he had recently become owner in fee, obtained leases from the corporation of the whole site of *Compton House*. These leases, seven in number, distinguished as A, B, C, D, E, F, and G, and all bearing date the 31st of March, 1866, were for terms of seventy-five years from March, 1866, at a peppercorn rent, and contained covenants by *Jeffery* for himself, his executors, and assigns, within five years to build upon the land according to such plan, as well as to the height and elevation or otherwise, as should be submitted by him and should be required and approved of by the council of the borough. *Jeffery* also covenanted not to alter the height or elevation of any building when so erected, nor permit the same to be altered without the consent of the council, and also to repair and maintain such buildings.

It appeared that *Jeffery* had originally intended to erect one entire building on the whole of the land, which consisted of about two acres, and to cover such building with a large central dome, but that intention was abandoned, as, on submitting his plans to the fire insurance companies, they insisted as the condition of accepting the insurance that the building should be erected in separate compartments, the openings between which should be capable of being closed by iron doors, and that the internal windows overlooking other portions of the building should be provided with iron shutters, so that in case of fire one part might readily be shut off from the others. The new building, to which the name of *Compton House* was given, was eventually erected, according to plans submitted to and approved by the council of the borough, and was so constructed that the different portions could be shut off from each other by iron sliding doors and iron or steel shutters, according to the requirements of the insurance companies, so as to prevent the spread of fire from one part of the building to another. These divisions coincided generally, but not exactly, with the boundaries of the several blocks A, B, C, D, E, F, and G, and the design was so arranged that the entire building might without much difficulty be converted into separate tenements, which would, however, be dependent on each

other to a large extent for access of light and some other easements. The block B, for example, was, according to the plans, dependent on open spaces and well-holes in blocks A, C, D, and E for light to many windows. The arrangement of the staircases was such that blocks A and C were dependent upon block B for access to the upper floors. Some rooms also included portions of different blocks, and the drainage of A and C passed partly through B. The result was that on the separation of the blocks considerable structural alterations would be necessary.

During the progress of the building, which was completed and opened for business in May, 1867, *Jeffery* obtained advances on the security of the different leases as follows:—

(1.) By indenture of the 4th of April, 1866, *Jeffery* mortgaged block A to Messrs. *Rae* and others, and by indenture of the 17th of December, 1866, he mortgaged block B to *Brocklebank, Littledale,* and *Tobin* as trustees of the *Liverpool Insurance Company.*

In May, 1871, *Brocklebank, Littledale, & Tobin* paid off *Rae's* mortgage and took a transfer of the security, and thereupon became first mortgagees of A and B. In the same year (1871) *Jeffery,* who up to this time had occupied the whole of the building for the purposes of his business, became bankrupt, and Messrs. *Brocklebank,* and the mortgagees of the other portions, thereupon entered into possession of the mortgaged premises, and on the 7th of August, 1871, Messrs. *Brocklebank* obtained a foreclosure decree *nisi* in respect of A and B. By underleases of the 19th of May and the 9th of October, 1873, blocks A and B were granted by Messrs. *Brocklebank* to the Plaintiff for the purpose of an hotel, which, after the necessary alterations, was opened in January, 1875, as the *Compton Hotel.*

In June, 1880, the Plaintiff purchased from Messrs. *Brocklebank,* who had surrendered leases A and B, and obtained renewed leases of these portions from the corporation for a term of seventy-five years from November, 1876, at a peppercorn rent, their interest in such renewed leases.

(2.) By indenture of the 30th of June, 1866, *Jeffery* mortgaged by demise to Messrs. *E.* and *R. Moon* the blocks comprised in leases C, F, and G, together with all buildings, erections, &c., lights, watercourses, privileges, easements, advantages, and

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appurtenants to the said pieces of land appertaining, or with the same or any of them demised, occupied, or enjoyed, with power of sale over the parts mortgaged, and a power of distress over the whole area (comprising A, B, D, and E, as well as C, F, and G), and the buildings thereon. By this indenture, after reciting *Jeffery's* intention to erect upon the land thereby demised, and upon A, B, D, and E, one continuous building or shop, but in such manner that if and when occasion should require the same should be capable of subdivision into separate buildings; that the plans, elevations, sections, and specifications for the said shop having been previously approved of by the council of the borough, had been submitted to *Stewart*, the surveyor of *E.* and *R. Moon*, and the same, so far as they related to the lands thereby demised, had been approved and signed by such surveyor, it was agreed that, subject and without prejudice to the covenants and conditions in the several leases, *Jeffery* should build and finish on the land thereby demised to *E.* and *R. Moon* such erections, buildings, and conveniences as should in all respects correspond to and be in accordance with the plans, &c., approved of by the said surveyor as aforesaid, and in particular so that the buildings to be erected should be separated from the other portions of the said intended shop, and also from each other by such party-walls, and that they should communicate with the other parts of the shop by such doorways and passages, and that such doorways and passages should be capable of being closed with such fire-proof or other doors as in the said several indentures of lease were provided. The mortgagees were empowered when in possession to close and keep closed the doors of the communicating passages, and, in case the powers of leasing or sale (thereby given to them) should become exercisable, effectually to wall or close up with bricks or masonry the doorways and passages, and to do every other act which should be necessary for effecting a complete separation of the buildings erected on the lands thereby demised from the surrounding buildings or from each other, to the intent that the erections and buildings which should be placed on the lands thereby demised might be used and enjoyed as two or more tenements to all intents and purposes whatsoever.

On the 7th of August, 1871, *E.* and *R. Moon*, who had entered into possession upon *Jeffery's* bankruptcy, obtained a foreclosure decree *nisi*. The Defendants, *W. H. Watts*, sen. (who had been in the employment of *Jeffery*), *W. H. Watts*, jun., and *A. J. Watts*, were at the commencement of the action in the occupation of block C as purchasers from Messrs. *E.* and *R. Moon*, under an assignment dated the 1st of November, 1876, of the residue of the term of seventy-five years under which that block was held; *W. H. Watts*, jun. having been previously in occupation under a sub-lease from Messrs. *Moon* dated the 24th of September, 1872, of C, together with all the rights, easements, and appurtenances thereto belonging or therewith held and enjoyed.

(3.) By indenture of the 20th of September, 1866, *Jeffery* mortgaged to *N. Duckworth* the portions comprised in leases D and E.

Upon the bankruptcy of *Jeffery* in 1871, *Duckworth* entered into possession, and on the 7th of August, 1871, obtained the usual foreclosure decree *nisi* over D and E.

The dates on which the several foreclosures became absolute were:—A, the 14th of March, 1872. B, the 3rd of July, 1872. C, the 28th of January, 1873. D, the 13th of June, 1872. E, the 15th of October, 1872.

The Defendants, Messrs. *W. H. Watts* and *A. J. Watts*, claimed (subject as to a portion of D to the tenancy of Plaintiff under an underlease) to be entitled to the premises comprised in D and E, under an agreement for purchase of the same from *Duckworth*, and were now in possession of E, where, and on C, they carried on business as haberdashers under the firm of *Watts & Co.*

In May, 1880, the Defendants had blocked up sixteen windows in that part of *Compton House* of which Plaintiff was in possession (block B), six of which derived their light from a large open space in the centre of the building in block D, and ten from a small open space or well-hole over the ground floor of a portion of the premises in C.

The action was brought to restrain that obstruction and to determine the rights of the Plaintiff as the owner and occupier

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of block B to the free access of light to those of his windows which faced the other portions of the building in the possession and occupation of the Defendants. A question was also raised by the pleadings as to the right of the Plaintiff to the user of the drains and pipes which were common to the Plaintiff's portion and the other portions, but this part of the case was not pursued.

The Plaintiff claimed the right to the access of light to the windows in question on the ground that they were apparent continuous easements necessary for the convenient enjoyment of the Plaintiff's portion of *Compton House*, and the property of the corporation of *Liverpool*, the freeholders of *Compton House* and the common landlords of Plaintiff and Defendants.

The Defendants by their pleadings denied that the windows in question were apparent or continuous easements, or that they were necessary for the convenient enjoyment of the Plaintiff's portion of *Compton House*. And, claiming to be entitled to C and E, under mortgages from *Jeffery* prior in date to that of B, under which the Plaintiff claimed, and containing no reservations to *Jeffery*, his executors, administrators, and assigns, of any light or easement of light over blocks C and E, they denied as a matter of law the easement over C and E claimed by Plaintiff. They also raised the case that upon the conversion of B into an hotel the original plan had been departed from, and that Plaintiff for his own convenience had altered the interior of the block so as to take away from the rooms lighted by the windows in question light which these rooms originally had over a well-hole in B.

It was proved that the building was in progress according to the original plans before the date of any of the mortgages, but, as the result of conflicting evidence, it appeared that at the date of the mortgage to *Moons* the walls were not so high as the windows the obstruction to which was complained of. It also appeared that the centre line of the wall of block B, which contained the windows overlooking the well-hole in C, coincided with the boundary of the plots B and C as shewn by the leases.

The action came on for hearing before Vice-Chancellor *Bacon* on the 22nd of June, 1882.

Hemming, Q.C., *Bigham*, and *G. Williamson*, for the Plaintiff:—

The Defendants will rely on *Wheeldon* v. *Burrows* (1) in support of their contention, that as the mortgage of June, 1866, under which they claim, did not expressly reserve any right or easement over the part then granted in favour of the adjoining portions of the land, no such reservation can be implied in favour of *Jeffery*, or the Plaintiff as his subsequent assignee of block B. But, even if that case has any application at all to a mortgage transaction, it distinctly recognises that there are exceptions to the general rule; such exceptions have occurred in the case of an easement of necessity, or where, as in *Allen* v. *Taylor* (2), the conveyances by the same vendor, though separate, are entered into contemporaneously and as part and parcel of one transaction, and in any case where adequate reasons appear. Here the reasons are overwhelming. The mortgage deed to *Moons* of June, 1866, is quite inconsistent with the right claimed by the Defendants as purchasers of C of obstructing the access of light to B. That deed contains express recitals that *Jeffery* had agreed to build one continuous building in accordance with plans which had been submitted to and approved by *Moons'* surveyors, and from which it clearly appeared that the windows in question would derive their light and their only light from the well-hole in C, so that *Moons* and the Defendants claiming under them are fixed with distinct notice, if that is necessary, of the intention to build *Compton House* as one entire building. The mortgages by *Jeffery* of the different blocks were all in substance one transaction, the raising of money to enable him to complete the entire building. There was a manifest intention shewn that the blocks mortgaged were to retain their lights, and it cannot be successfully contended that the mortgagee of one block has acquired any right to obstruct the lights of the adjoining blocks and thus destroy the property of the several other mortgagees claiming under the same mortgagor: *Allen* v. *Taylor*.

But even if the Court should not accept this view, the Defendants cannot claim the benefit of the rule enunciated in *Wheeldon* v. *Burrows*. Whatever rights a purchaser may have to block out

(1) 12 Ch. D. 31. (2) 16 Ch. D. 355.

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light where there has been no reservation of the easement by the vendor, there is no such right in a mortgagee of blocking out the light of an adjoining tenement of the mortgagor. And if it is said that the mortgagee had by foreclosure become a purchaser, and thereby acquired all the ordinary rights of a purchaser, then we say that our foreclosure (absolute), being earlier, placed us at an earlier date in the position of purchasers from the trustees in bankruptcy of the mortgagor, who were then, subject to the mortgages upon it, owners of the Defendants' block as well as ours. And if the rule stated in *Wheeldon* v. *Burrows* (1) is to be applied, it applies in our favour and decides that as against those vendors we acquired the right to say that they should not derogate from their grant and block up our windows. The rights of those vendors became vested in the Defendants by subsequent purchase on their foreclosure, and the Defendants must take subject to all the obligations of their vendors; but the better view is that *Wheeldon* v. *Burrows* does not apply to the case of a mortgage at all.

Millar, Q.C., *Clare*, and *Rotch*, for the Defendants:—

The Plaintiff claims an easement of light to the windows of B over the Defendants' block C. But in order to establish their claim they must shew either an express grant of the easement or that it is a continuous, apparent, necessary easement, so as to involve by implication of law a grant of the easement by the common grantor. They have failed to shew either the one or the other, and the case therefore falls within the general rule stated in *Wheeldon* v. *Burrows*, on which we rely, that as the prior conveyance of June 1866, under which the Defendants claim, did not contain any express reservation of the right, there can be no implied reservation of any right over the land first conveyed to *Moons*. *Allen* v. *Taylor* (2), on which the Plaintiff relies, does not help him, as the circumstances relied on by the Master of the Rolls, as taking that case out of the general rule in *Wheeldon* v. *Burrows*, that the conveyances were contemporaneous and must be treated as one transaction, do not exist here. That general rule must apply to leaseholds as well as to freeholds:

(1) 12 Ch. D. 31. (2) 16 Ch. D. 355.

Master v. *Hansard* (1). In this case the easements did not exist at the date of the conveyances to the predecessors in title of either the Plaintiff or the Defendants, as the building was not completed until May, 1867, after the date of the mortgages of B and C, and the reservation of an easement in a grant was not certainly so implied in a case like this when the easement did not exist at the date of the grant. If there was any reservation of an easement it was lost by the surrender of the original lease to the corporation: *Booth* v. *Alcock* (2).

Hemming, in reply.

BACON, V.C.:—

No doubt this case at first sight presents some difficulties, but I think that the evidence has made that which at first sight seemed difficult, if not doubtful, perfectly clear. To begin at the beginning, the intention of *Jeffery* was to build one large edifice, which, of course, he could not do without getting a lease from the corporation, and the son in his evidence described his intention as being to make one large edifice, something like the *Pantheon* at *Rome*, or the *Mosque* at *Constantinople*, with one enormous dome which should cover the whole building. That was found to be impracticable, and thereupon, not only for that reason, but because of the difficulty of effecting an insurance upon the one centre building, it was determined that there should be five divisions of that building, but that the elevation was always to be the same. That the elevation was approved of by the corporation is, I think, sufficiently proved. The stipulations ultimately made were that there should be several leases granted of that plot of land, that separate edifices might be raised upon it, but all used for one purpose, if the original owner chose so to deal with them, and therefore doorways, passages, and partitions furnished with iron doors were hit upon. He might have carried on his haberdashery business in that one entire building, though it was so divided. The division at least is a common fact known to everybody dealing with this property, and (which serves the present matter more than any other thing) known distinctly to

(1) 4 Ch. D. 718. (2) Law Rep. 8 Ch. 663.

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the mortgagees, the *Moons* through whom the Defendants claim. They took their mortgage by the instrument of June, 1866, which describes in the plainest manner possible that there are to be separate buildings, that the thing in which the *Moons* were to be concerned was part of an edifice built according to the elevations, the plans and specifications which had been approved of by Mr. *Stewart*, and which, it is in evidence, had before then been approved of by him, although the particular plans signed by him are not now in evidence.

In 1866 the construction began, and it was carried on (the exact date at which it was completed does not appear) as one entire thing. The builder was examined, and produced his contract, and said that the whole structure was completed according to the specifications referred to in his contract, and in 1867 or 1868, after the date of the mortgage deed, the thing was completed exactly as it now stands. The mortgagees having the title under the deed of June, 1866, which has been referred to, adopt Mr. *Stewart's* plan and the specifications, and they stood by, and from that time until the present dispute arose made no sort of objection to what had been done on their own or on the adjoining land, and now it is said that because the eastern wall of the block B is built, part of it on the land demised to *Jeffery* first, and by him mortgaged to *Moons*—because that wall stands upon part of their land, they are entitled to do that which the Plaintiff complains of.

Upon the most ordinary principles of administration in a Court of Equity a person who stands by and sees another building upon his land, can never challenge or dispute what the other has done. I do not say the evidence is clear, but I am ready to adopt it as a fact, that the eastern wall of the division B is built to a certain extent—half at least of its thickness—upon the land of the Defendant—I say the Defendants cannot complain of that now. This was not reserved in the grant made to them. They have seen the man who built that wall build it at his own expense; they have taken advantage, such as it is, of having that barrier between them and the other parts of the building; they have seen the windows built as they were built, and they have never interfered with them, or proposed to interfere with them in the

slightest degree, and now I am asked to apply *Wheeldon* v. *Burrows* (1), and to say that because there was no reservation of light at the time when the mortgage was made to *Moons*, therefore the mortgagor granted to them the right to stop up the windows, did not reserve anything for himself, and therefore cannot derogate from his own grant. I say such a conclusion would be perfectly monstrous. The evidence is clear and distinct that there was to be one general structure erected, one part of which was to be the property of *Moons* under this mortgage. *Moons* have had the edifice raised which they contracted to have raised. They have had it built under the inspection of their own surveyor, and from 1866, or 1868 at the most, they have known the state of things existing, and it is said now that because they have got a demise of that square plot of land, which is all that is described in the lease from the corporation, they are at liberty to stop up these windows. If they are, they are entitled to build. It is said this is a party wall, and they may therefore build upon their own division C right up to the eastern wall of B. Is it possible to suppose they would do that? All that they have asserted as yet is a right to stop up their neighbour's windows, and to do that by fixing obstructions on the wall. I say that at the time the mortgage was made to them they must be taken to have had full knowledge, through Mr. *Stewart*, their architect, who had inspected the place generally, and the specifications, that that adjoining building was to have in it the windows as they stand now; and having during that period never challenged or disputed that right, it is too late for them now to say that they are entitled to stop up the windows or (which is between them and the corporation) invade the rights which the corporation would not be slow, I dare say, to exercise, if they attempted to build on what is called the well-hole in their block C.

The conduct which the Defendants have pursued I have not heard a word of apology for or any reason for. It is not suggested that there is any overlooking of their house, or that they suffer any inconvenience or annoyance, but for some reason which I cannot penetrate, they go to their neighbour's house, first of all stop up by solid bars the windows upon that party wall which

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they say is theirs, and which they have relinquished to their neighbour, who at his own expense has built the whole party wall, and, failing to succeed in that, they plaster tar, which in a civilised country is a most extraordinary proceeding, over the windows of the Plaintiff, in order to do what? Gain any advantage for themselves? There is no pretence for it. To assert any right? There is no right in question; but in order that they may do mischief to their neighbour they plaster over these windows. Then I am told that *Wheeldon* v. *Burrows* (1) has settled this question; and the main stress of the argument for the defence is that as there was an assignment of the lease by way of mortgage and no reservation of the rights of the adjoining houses, therefore there could be nothing claimed by the mortgagor or the persons who are now entitled to the property. I am of opinion that there is no ground for any such contention. *Wheeldon* v. *Burrows* is as plain a decision as can be found. The facts in that case were plain beyond dispute. A man had a shed with windows on one side of it, and he had also a piece of adjoining land. He chose to sell the land without making any reservation. The man who bought the land had a right to do what he chose with it. Is there any resemblance between that case and this? This is a mortgage of a building which is a part of a larger edifice or general structure, which edifice could not be constructed but in the manner described by the plans which Mr. *Stewart* approved of, and which the mortgage deed says he approved of. As to the well-holes, as they are called, these spaces between the external wall of the building and the other parts of the building, no light could have come to them, unless it had been by means of the *Pantheon* dome which has been described. In my opinion, *Wheeldon* v. *Burrows* has nothing to do with this case. It is not because the mortgagor did not in terms reserve to himself a right of using the windows that he is entitled to it, but because the mortgagees, parties to a general scheme of building, were content to take the building constructed as their surveyor, Mr. *Stewart*, had approved of; they cannot now withdraw from that, and cannot now say to the Plaintiff or his predecessors in title, "You have at your expense built that house upon my land"—if you will, though it is by no means clear—"now I will exercise

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against you the same right as I should have over the space covered by half of the party wall, as if you had never built at all." That is what they claim. In my opinion that is not a claim which can be sustained either in law, justice, or common sense. I think the Plaintiff is clearly entitled to an injunction to restrain the Defendants from trespassing upon the Plaintiff's land by blocking up his windows. I am aware that a witness has been examined who in a very authoritative and dogmatic manner said that light and air could be procured elsewhere. What has that to do with it, if it is true? Light and air may be procured, no doubt, by a thousand ingenious contrivances which any skilful or some unskilful architects might suggest. But what has that to do with this case? The case is clear that from 1868, with the assent and by the permission of the Defendants, that building B has existed with windows in it, and after that, in my opinion, the Defendants are precluded from making any claim under *Wheeldon* v. *Burrows* (1), or any other law that I am acquainted with, to do the brutal thing which they have done, to plaster tar over the man's windows and spoil his furniture contained within the rooms. I say nothing about the pipes. I have not got any such case before me. I make no order as to the pipes, but there will be an injunction restraining the Defendants from trespassing on the Plaintiff's premises, or from erecting any structure or doing any act so as to obstruct the access of light to any of the Plaintiff's windows with an inquiry as to the damage which has been inflicted by the Defendants in this wanton, inexcusable, wilful trespass upon the Plaintiff's windows.

F. G. A. W.

From this judgment the Defendants Messrs. *Watts* appealed. The appeal came on for hearing on the 19th of November, 1883.

Davey, Q.C., and *Clare*, for the Appellants, declined to argue the appeal so far as it related to the trespass.

Hemming, Q.C., and *G. Williamson*, for the Plaintiff.

Millar, Q.C., and *Russell Roberts*, for the Defendant *Duckworth*.

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1883. Dec. 21. COTTON, L.J.:—

This was an appeal from a judgment of Vice-Chancellor *Bacon*, and his judgment granted relief against the Defendants in respect of two matters: in respect of a trespass which they had committed by tarring windows, and in respect of lights, not ancient lights, for which the Plaintiff claimed protection. As regards the trespass, the counsel for the Defendants, the Appellants here, did not argue the point; but they confined their argument on the appeal to the question whether the Plaintiff was entitled to protection for his lights. In order to determine whether the Plaintiff is entitled to the protection he claims in respect of the lights, we must consider what the circumstances of the case are. [His Lordship stated the facts as before narrated, and continued:—]

The question which we have to consider is this: whether having regard to the deeds which were executed, or to the circumstances of the case, there is any implied grant or reservation by the Defendants or their predecessors in favour of the Plaintiff or his predecessors which would give to the Plaintiff a right to say that his lights, although not ancient, are entitled to protection.

There is a great difference between an implied grant and an implied reservation. That was very much considered and dealt with by this Court in the case of *Wheeldon* v. *Burrows* (1). When a man grants a thing he must be considered as granting that which is necessary in the proper sense of the word for the enjoyment of that which he grants, and he cannot derogate from his own grant; he cannot do that which will destroy or render less effectual that which he has granted. But as regards reservation, the matter stands on principle, in my opinion, in a very different position. To say that a grantor reserves to himself in entirety that which may be beneficial to him, but which may be most injurious to his grantee, is quite contrary to the principle on which an implied grant depends. That principle is that a grantor shall not derogate from or render less effectual his grant or render that which he has granted less beneficial to his grantee. Undoubtedly there are exceptions—there are two certainly. Where

(1) 12 Ch. D. 31.

the easement of which the reservation is claimed is a mutual easement required for the grantor; as where there is a grant of a house by the owner of two adjoining houses which mutually support each other, there the easement is mutual, and, as there is an implied grant of the easement, so there is an implied reservation of a similar easement in favour of the grantor. So again where there is existing at the time that which is said to be a continuous easement, and of necessity—not an easement strictly, but that which is in the nature of easement—as a way of necessity; of that there is or may be an implied reservation. Take the common case of a man having a field, which he does not sell, in the midst of land which he sells; of course it is implied that he intends to have the power of using the field not sold, and not to give the exclusive right or control over it to the person to whom he sells the surrounding land, and a way over that is said to be a way of necessity, and that is reserved without express words as an implied reservation. There is another case which is referred to, but it does not come within that exception, in fact it is an example of the very strong way in which the Courts insist upon the principle that a grantor shall not derogate from his own grant. I refer to the case where there are several grants, not absolutely at the same moment, but so far at the same moment that they are to be considered as one transaction, and done at the same time; then each of the grantees gets the benefit of an implied grant of easements. It is said that that is a reservation. It really is not a reservation, but in order to make all those grants which are looked upon as one transaction available and effectual, it is considered that each of the grantees is to be looked upon as taking from the grantor, while he has still the power to give it, what it is right that he should get: so that there is an implied grant against all the other grantees of those easements which will be reasonably necessary for the property which is conveyed.

Let us go through the mortgages to see whether there is anything in the mortgages as a matter of construction from which any grant by or reservation against the Defendants can be properly inferred. In the leases all that we find is that the plan is to be approved, and then no alteration is to be made either

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in elevation, which it is admitted is immaterial for the present purpose, or in height. The mortgage to *Moons* undoubtedly does refer to the buildings which were going to be erected on the entirety of the block, and that was very much relied upon. But this is remarkable, that although it is referred to, the only stipulations in the mortgage are covenants with reference to the buildings to be erected on the plot C which was mortgaged to *Moons;* there is no covenant whatever as to the buildings on the other plots which formed this large square, but only as to those which were to be on block C. That, to my mind, is material for the purpose of seeing whether such a reservation can be implied from the contract, because, if it had been intended that there should be any such reservation, should we not have expected to find some covenant as to erecting these buildings? Undoubtedly both parties did expect that the plan would be carried out, but in the covenant a stipulation is introduced only as regards those on plot C. Then provision is made for the separation of the building on plot C from the building on the other adjoining plots; and if there was to be any such stipulation as to lights we should expect to find it expressed when the parties are seen to have contemplated that there might be a separation and a holding of the buildings on the different plots as distinct and separate buildings. But we find nothing of the kind. In the deed I have been able to find nothing from which we can infer that there was to be any such reservation, or any such protection to the buildings on the other plots. Probably it was considered that as there was a stipulation as regards not altering the height that would be sufficient. But we are not dealing now with any interference with lights by altering height of buildings; what we have to consider is whether the Plaintiff has got any reservation, independently of the stipulation that the height of the buildings shall not be altered. In *Duckworth's* deed there is very much less than in the deed which I have already considered. In my opinion there is not either in the leases or in the mortgages anything from which the reservation relied on by the Plaintiff can be implied.

Now let us consider whether from the circumstances of the case any such reservation can be implied. As regards the plan

of those buildings, each of the plots had an area, or an internal well, which to a considerable extent does provide for the lighting of the buildings to be erected on the different plots. The plot B, in respect of which the Plaintiff claims, has that internal well. Plot C, one of the plots which the Defendants hold, has that internal well; and it was in reference to the lights of the Plaintiff's building which look into the well of plot C, and also as regards those lights which look into the well or courtyards of the plots opposite to it in the rear of B, that the question arises. Here it was not necessary at all, so far as one can see, in fact it could hardly be suggested it was necessary, that in order to get light for the buildings on plot B, they should be lighted otherwise than from the well on their own plot. In fact, as far as one can see, the rooms might be lighted from that plot. That is my opinion, certainly. Undoubtedly there are lights which now do look into the well of plot C, and into the wells on the other plots, but the rooms might be lighted, though probably not so conveniently—but still they could be lighted—from the internal well in plot B itself, and therefore, it cannot be said this is anything like a way of necessity. What it really comes to is this, that if it is not a right of necessity, the takers of block C and all the other blocks are bound by reservation or grant not to do anything which can render the buildings on the other plots less commodious and convenient than they are as erected in accordance with the plan. In my opinion it would be wrong and a violation of the principle that a grantor shall not derogate from his own grant, to imply any such reservation against, or any such grant on the part of, the separate grantees of the different plots here.

Then can it be said, that this was one transaction, a contemporaneous act, so that the principle of the case to which I have referred can be brought in? In my opinion it cannot. There is nothing at all which shews that at the time the mortgage was granted to the predecessors of the Defendants it was contemplated that the other blocks should be mortgaged, or that *Jeffery* should part with the other blocks.

But it may be said that it ought to be implied with reference to the rights of the landlord and the rights of his tenant. Now in my opinion, that would be wrong. The landlord put into his

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leases such stipulations as he thought were desirable in order to protect himself, in the case which was contemplated of the several leases of these different plots, although originally granted to *Jeffery* being separated and becoming the property of other and different persons. In my opinion here, we cannot, either from the circumstances of the case, or from the deeds, imply any such reservation or what would be a grant or stipulation by the different lessees and holders of these different portions as would justify the judgment of the Vice-Chancellor that the Plaintiff is entitled to protection for the lights which are not old.

We must not disregard what I think was one of the grounds on which the Vice-Chancellor acted. He appeared to consider that there was some equity arising against the Defendants from their allowing the owner of the other block, that is to say, *Jeffery*, who was then holding the other block, to erect the buildings on those different blocks. In my opinion, the facts of the case do not justify the conclusion that there is any equity against them. They did nothing; it is true they saw him going on, but he knew the title and facts as well as they did. The doctrine as to a person lying by so as to create an equity against him arises, if either he does something from which it can be reasonably inferred that he induced the other persons to think he would raise no objection to what they were doing; or if he knows facts which are unknown to the other persons acting in violation of the right which those facts give, and does not inform them about it, but lies by and lets them run into a trap. But here I can see nothing of the kind. When the *Moons* got this separate block C, they knew their title, they had no reason to suppose that the owners of the other blocks did not know their title; in fact it is not suggested they did not; and all they did was this, they did not tell them (and it would have been said to have been most officious if they had), "Now mind if these blocks become separate blocks we may do something which will interfere with the plan of the buildings."

I have dealt with the case now generally. *Duckworth* has been made a Defendant here, and as regards him I see no case whatever why he should be made a Defendant. As against him the action must be dismissed with costs.

As regards the costs, we shall not disturb the order made as to costs in the Court below. The majority of the Court agree with me in reversing that judgment. If we grant the Appellants what in my opinion is right, they will have failed in part of the appeal, and will have only succeeded in part; and there ought to be, in my opinion, no costs of the appeal.

LINDLEY, L.J.:—

I have the misfortune to take a different view of this case from that taken by my learned brethren, and as the case is one of considerable intricacy and difficulty I have stated in writing the view which I take of it.

The buildings which have to be considered in this case were constructed under very peculiar circumstances.

The corporation of *Liverpool* were the owners in fee of a piece of land. They agreed to let that land to a person of the name of *Jeffery* for building purposes. He purposed to erect one large building upon it, but so to construct that building as to render it capable of being subdivided into a number of separate houses. However, as *Jeffery* had not the capital required to build so large an edifice, it was necessary for him to raise money for the purpose by mortgaging the land and building.

In order to carry out this scheme it was necessary that three parties should all concur, viz.: 1. The owners in fee; 2. The builder, their tenant; and 3. His mortgagees.

The scheme was in fact concurred in by them all, as is proved partly by the deeds which were executed and partly by the fact that such a building as I have mentioned was erected on the land in question. [His Lordship then referred to the facts set forth above, and described the construction of the buildings, and then proceeded as follows:—]

This mode of construction was adopted openly and without any objection on the part either of the lessors or of the mortgagees of the builder. The elevations of the building were submitted to the lessors, and were approved by them. Whether all the plans shewing the well-holes and windows lighted by them were submitted to and approved by the lessors was not proved, neither was it distinctly proved that the mortgagees saw and approved of

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these plans, although there is a recital in the mortgage to *Moons* to the effect that they had approved of the plans of C, F, and G. But, in my opinion, it is perfectly clear that the mortgagees, as well as the lessors, either knew how the various blocks were being constructed, or were content to allow them to be constructed by the builder as they were constructed, without troubling themselves about the matter. In either case the lessors and mortgagees must all be taken to have authorized the builder to construct the building as he did, and, in particular, to construct that block B in such a way as that it should be dependent for light to some of its windows on the adjacent blocks C, D, and E. These windows were necessary for the use of the rooms lighted by them, necessary, that is, for their use as constructed, necessary in the sense explained in *Ewart* v. *Cochrane* (1) and in *Watts* v. *Kelson* (2); and the spaces left in the blocks C, D, and E were so left in them for the purpose, amongst others, of lighting some of the windows in block B. In fact each block was constructed as part of one design, and so as to be subservient more or less as regards light, support, communication, and otherwise, to the other adjacent blocks, power being reserved, nevertheless, as regards blocks E, F, and G, to cut off the communication through the iron doors. This having been done by the lessee of all the blocks, with the consent of his lessors and his several mortgagees, the question arises whether the mortgagees of blocks C, D, and E, or purchasers from them, can block up the windows of block B which are so lighted. In my opinion they cannot. Under the peculiar circumstances of this case the rights of the owners and occupiers of block B are, in my opinion, the same as if the mortgagees of blocks C, D, and E had expressly granted an easement of light to the owners and lessees of block B.

The Defendants contend that no easement can be considered to have been created in favour of block B, and they rely on the law examined with so much care in *Wheeldon* v. *Burrows* (3). I take the general rule to be as there laid down, but, in my opinion, this case does not fall within it. This is not the case of a vendor of a piece of land attempting to derogate from his own grant. It

(1) 4 Macq. 117. (2) Law Rep. 6 Ch. 166.
(3) 12 Ch. D. 31.

is more like the case of several persons interested in several pieces of land all agreeing to build upon them in a particular way, so as to accommodate one another, and of one of them afterwards, when the buildings are up, insisting on rights which are quite inconsistent with the enjoyment of the buildings as erected. There is no authority to shew that in such a case any one of such persons could afterwards build on his own land so as to obstruct his neighbour's lights, and in the absence of such authority I am of opinion that he cannot do so. In such a case it appears to me that the cross easements which are created in the first instance are impliedly granted in equity if not at law, and if such easements are apparent, no purchaser can protect himself against them by alleging that he bought without notice of them. The principles of *Dann* v. *Spurrier* (1) and *Cotching* v. *Bassett* (2) are, in my opinion, applicable to such a case. *Cotching* v. *Bassett* is a case which appears to me to have a bearing on this, although, of course, the facts differ, as facts in cases always do. The marginal note in that case, so far as it is material, runs thus: "The owner of a dominant tenement in the course of rebuilding, materially altered his ancient lights; this was done after communication with the owner of the servient tenement, and with the knowledge and under the inspection of his surveyor, but without any express agreement:—*Held*, that in equity the lights as altered could not be interfered with, and a perpetual injunction was granted." As regards notice, the recitals in *Moons'* mortgage and the state of the buildings gave these Defendants clear and distinct notice of the mode in which it was intended to build on the several blocks, and of the mode in which that intention had been carried out. This notice was acquired by the Defendants not only before they purchased block C, but also before they bought D and E, if, indeed, those blocks have yet been conveyed to them. They are therefore in no better position than the mortgagees under whom they claim.

The view taken above of this case renders it unnecessary to deal with some difficulties which might otherwise have to be considered. I refer more particularly to the technical points arising from the dates of the various conveyances, and from the surrender

(1) 7 Ves. 231. (2) 32 Beav. 101.

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of the original lease of block B. The lessors of block B were also lessors of C, D, and E, and it is idle to suppose that they would have allowed the whole building to be completed as it was if the mortgagees of C, D, and E had not acquiesced in those blocks being made subservient to the adjoining block B. This circumstance distinguishes the present case from the others in the books, and, in my opinion, the lessors of block B had as much right as the lessee to prevent the mortgagees or tenants of blocks C, D, and E from interfering with the lights of block B. The right to the lights of block B impliedly granted by the mortgagees of the adjoining blocks, was not only impliedly granted to the lessee of that block during the continuance of his lease, but was impliedly granted to his lessors as well as to him. The surrender of the lease of block B did not, therefore, determine the easement so impliedly granted. The only effect of surrendering the lease of block B was to enable the lessors to relet the block B with such rights as they had in respect of it, and this they did.

The Plaintiff now claims under the lessors, and is entitled to such rights and easements as they were entitled to by virtue of the implied grant to which I have already alluded.

For these reasons, and so far as the Defendants Messrs. *Watts* are concerned, I am of opinion that the decision of the Vice-Chancellor was correct, and that their appeal ought to be dismissed. As regards *Duckworth* the case is different, he has in no way interfered with the Plaintiff's lights, and he ought not to have been made a Defendant. His appeal ought, therefore, to be allowed, and the action against him ought to be dismissed with costs.

FRY, L.J.:—

As I have the misfortune to differ not only from the learned judge in the Court below, but also from my learned brother who has just delivered his judgment, it is my duty to state my opinion at somewhat greater length than I should otherwise have done. In order to make my view clear, I must refer to some of the facts, although they are not really in controversy. [His Lordship then stated the facts before set forth and continued:—]

Two questions have been discussed. First, assuming that the Plaintiff has all *Jeffery's* rights in the lot B, can the Plaintiff insist on a right to the access of light through this well-hole and over the lower building? The second question which has been raised is this. Has the Plaintiff lost any rights of *Jeffery*, by reason of the surrender of the lease to the corporation? In the view which I take, it is not necessary to express any opinion with regard to the second question, and I only advert to it for the purpose of shewing that I do not express any opinion adverse to the Appellants on the point. Now it appears to me to be clear that the rights of the Defendants must be determined by reference to the legal effect of the mortgage of the 30th of June, 1866, construed by the light of the surrounding circumstances. It appears to me to be plain that that deed was intended to ascertain and determine the relations between the mortgagees of *Jeffery* taking lot C., and *Jeffery* himself who continued the lessee of lot B., and I for myself hesitate to speculate on the existence of any collateral contracts giving additional rights to the one party or casting additional burdens on the other. Before referring to the deed, it appears to me important to inquire what were the surrounding circumstances at the date of the execution of that deed. They may be shortly stated thus: *Jeffery*, who is described as a silk mercer, and who is stated to have had his shop burnt down in the previous year, was minded, it appears, to erect a large store or magazine for the purpose of carrying on a great business upon the seven plots of ground, and at the same time he was minded to so erect the building as that portions of it might, if circumstances rendered it desirable, be used as independent tenements. Now at that time *Jeffery* was the unencumbered lessee not only of the plots B and C, but apparently of all the other plots. It is plain that at that time plans had been prepared for the entire building and had been sanctioned by the corporation, and had been approved by Messrs. *Moon*, so far only it seems, as related to the three plots C, F, and G, of which they became mortgagees. It further appears that the buildings had been begun, but the deed does not shew how far they had advanced at the time of the execution of the mortgage. Those are the circumstances shewn to have existed. I will further

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observe that it is not shewn that there was any primary intention that the blocks should be used as separate tenements, but the primary intention rather appears to have been to use all as one tenement for the purpose of the very large trade to be carried on by *Jeffery*, and there is not shewn to have been any intention to sell or let the lots reserved by *Jeffery* to third persons, nor is it shewn that there was any intention on *Jeffery's* part at that time to mortgage any of the other lots. Lot C being, as I have already observed, the first lot which is shewn to have been mortgaged by *Jeffery*, he may, for anything I know or for anything that is shewn, have hoped, expected and intended to retain all the other lots unencumbered by any mortgage. How that may be, I know not. Now those being the circumstances, I turn to the deed of the 30th of June, 1866, and I find in the first place that it recites the three leases of the lots C, F, and G, which were to be mortgaged, but that it does not recite the leases of the other four lots, although it refers to the existence of an intention to build upon them. Then I find a series of recitals which shew the exact condition of things to which I have already referred. The first recitals which are material to refer to are not to be found in the introductory recitals to the deed, but in a set of recitals preceding the agreement which followed: "And whereas it is the intention of the said *J. R. Jeffery* to erect upon the piece of land hereby demised, and upon the said pieces of land in the plans drawn in the margin of the hereinbefore recited indentures marked A, B, D, and E, one continuous building or shop, but in such a manner as that, if and when occasion shall require, the same shall be capable of sub-division into separate buildings, and whereas the plans, elevations, sections and specifications for the said shop having been previously approved of by the council of the borough of *Liverpool*, have been submitted to Mr. *John Stewart*, the surveyor of the said *E. Moon* and *R. Moon*, and the same so far as they relate to the buildings to be erected on the pieces of land hereby demised have been approved by such surveyor, and have been authenticated by his signature." Then the agreements which follow amount to this, that *Jeffery* agrees to build and finish the buildings on the mortgaged plots. He enters into no stipulation with regard to the others, but he

agrees particularly that he will construct the building in such a manner that it may be separated from the adjoining buildings; then there is a power given to the Messrs. *Moon* to enter, supposing *Jeffery* has not completed his building by the 30th of June, 1868, and a power to complete the building on the mortgaged plots in such a manner as they shall think proper, provided they observe the covenants in the leases. Now it is conceded on all hands that the covenants in the leases do not affect the internal arrangements of the building, and do not affect the well-hole. They affect the height of the building and they affect the external elevation of the building, but not what are sometimes called the back fronts or internal elevations. It appears to me that under the stipulation just mentioned, supposing *Jeffery* had made default in completing his building, it would have been perfectly competent to the *Moons* to enter and to fill up the well-hole in question, because they were at liberty to complete the building in such manner as they should think proper, provided they did not violate the stipulations in the lease. These covenants conferred upon them another power, namely, a power to lease to any person who would enter into covenants with them to complete the buildings according either to the original plans, or in such a manner as to Messrs. *Moon* should seem expedient. The same observation arises there. It appears to me, if Messrs. *Moon* had been minded in the case of default of *Jeffery* to lease the property to some person who desired to fill that well-hole, they could certainly have done so. There is an express power given to depart from the original plans. Then after certain provisions relating to the repayment of any outlay to be made by the Messrs. *Moon*, there is a power given to the Messrs. *Moon* to close up the passages and to effect a complete separation, and those words appear to be very important. They may "effect the separation and do every other act as to them or him in their or his discretion may appear necessary or convenient for the purpose of effecting a complete separation of the buildings which shall be erected on the pieces of land hereby demised, or any of them, from the surrounding buildings, or from each other, to the intent that the erections and buildings which shall be placed on the land hereby demised may be used and enjoyed as two or more

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separate tenements to all intents and purposes whatsoever." It does appear to me that if the real contract between the parties had included the reservation of a right of light over part of this separate building, it must have found expression in that clause. The buildings are separate tenements to all intents and purposes whatsoever, owing no servitude one to the other. The maxim that *expressum facit cessare tacitum* appears to me to apply most strongly to that clause. Therefore, whether I look to what it says or to what it does not say, I have come to the conclusion that it is impossible in the face of that instrument to hold that there is an implied reservation which gives a right over the well-hole, which, as I have said, might in my judgment have been filled up either by the Messrs. *Moon* or by any lessee under them.

It has been said, however, that looking at the circumstances under which this entire building was constructed, it comes within the cases upon building schemes. In the first place, I make this observation, that the primary object in this case was not the existence of separate tenements, but the existence of one tenement which *Jeffery* hoped and intended to occupy as a single shop. The cases upon building schemes arise where separate tenements are intended to be enjoyed separately. The implied grant of easements in those cases arises only, in my judgment, where both conveyances are the result of contracts deemed to be contemporaneous, and so are deemed to be themselves contemporaneous parts of one transaction. As the same vendor is selling to two persons at the same time, each purchaser is entitled, in favour of the house he buys, to the benefit of the maxim that no man shall derogate from his own grant but, at the same time, he has the burden of the same maxim in favour of his neighbour's house; and the result is, that all the *quasi* easements which existed between the two lots in the hands of the one owner, the vendor, are perpetuated by way of implied grant, in the hands of the respective purchasers. As I have already said, I am unable to find that there was any contemporaneous bargain, any intention known to the *Moons* that the other plot should be either leased or mortgaged separately; but, on the other hand, I think that the primary intention was that the building should be treated as

one entire structure. Now on this part of the case I have only to add that it appears to me that we could not come to any other conclusion without violation of the principles of law which have been laid down and so fully expounded in the case of *Wheeldon* v. *Burrows* (1). There is only one passage which I wish to refer to in that judgment, the passage in which *Thesiger*, L.J., in giving judgment, cites the earlier cases of *Suffield* v. *Brown* (2) and *Crossley & Sons* v. *Lightowler* (3). Lord *Westbury* had said, in the case of *Suffield* v. *Brown* (4): "It seems to me more reasonable and just to hold that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by the fiction of an implied reservation." Lord *Chelmsford* cited that observation in *Crossley & Sons* v. *Lightowler*, and added (5): "I entirely agree with this view. It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it unless he shews the contrary by expressly reserving it. The argument of the Defendants would make in every case of this kind an implied reservation by law; and yet the law will not reserve anything out of a grant in favour of a grantor, excepting a case of necessity." I entirely agree with what has been said by Lord Justice *Cotton* on the subject of necessity. It appears to me that the evidence in this case shews that the light from the well-hole is not light of necessity, because light can be obtained from the proper well-hole of block B. Whether in any case light can be deemed an easement of necessity, is a point upon which I desire to express no opinion.

One other observation I must make before I leave this part of the case. The learned Vice-Chancellor appears to me to have proceeded upon the ground of acquiescence—acquiescence barring the assertion of a legal right. Upon that point I adhere to the opinion I expressed in the case of *Willmott* v. *Barber* (6), and I

(1) 12 Ch. D. 31.
(2) 4 D. J. & S. 185.
(3) Law Rep. 2 Ch. 478.
(4) 4 D. J. & S. 190.
(5) Law Rep. 2 Ch. 486.
(6) 15 Ch. D. 96, 105.

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will read what I there said, not because I treat it as any authority, but because it still expresses the views I have upon that subject. I there said, "A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money, or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiesence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right." Now it appears to me those essentials are wanting in the present case. I find no evidence to shew that the Plaintiff or those under whom he claims were under any mistake with regard to their legal rights, or that any money was expended by them on the faith of that mistaken belief.

All the general observations which I have made upon the case between blocks B and C apply, of course, to the Plaintiff's case as against D and E. The material difference, if material it be, is that in that case the Defendant's title is made out under a mortgage of the 20th of September, 1866, to Mr. *Duckworth*, which has since been foreclosed. Now that mortgage contains no recitals with regard to the buildings at all, and it therefore does not afford a foothold for the argument on both sides with regard to the operative recitals in the other mortgage of block C, but it appears to me to be the simple case of a mortgage without any reservation, and I think, therefore, it is impossible

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in that case to imply a reservation. The other observations which I have made entirely apply to that. The result is, that I concur with Lord Justice *Cotton* in thinking this appeal must be allowed by varying the judgment of the Vice-Chancellor, and the manner in which it will be varied will be this: The action must be dismissed with costs against *Duckworth*, the injunction, so far as it relates to the trespass, will be made perpetual against the Defendants, Messrs. *Watts*. Then the inquiry with regard to damages for the trespass will remain as in the direction of Vice-Chancellor *Bacon*, and the order with regard to payment of the costs will be varied by striking the name of *Duckworth* out of that portion of the order, otherwise it will stand. Considering that the Appellants have abandoned a large part of their appeal, and that their conduct was such as was said to be brutal by the learned Vice-Chancellor, a definition from which I do not dissent, I entirely agree that this appeal, although it has been partially successful, must be allowed without costs. *Duckworth* must have his costs.

Solicitors: *Williamson, Hill, & Co.*, agents for *Haigh, Son & Co., Liverpool; Brook & Chapman*, agents for *Goffey & North, Liverpool.*

M. W.

In re MILAN TRAMWAYS COMPANY. *Ex parte* THEYS.

C. A. 1884 Jan. 16, 17.

Company in Liquidation—Claim against Company assigned to Debtor to Company and again assigned by him—Set-off—Judicature Act, 1875, *s.* 10—*Rules of Court*, 1875, *Order* XIX., *r.* 3.

A company in 1877 was ordered to be wound up. In 1879 *H.* took assignments for value of the debts proved by and certified to be due to several creditors. On the 23rd of January, 1880, the liquidator took out a summons under sect. 165 of the *Companies Act*, 1862, that *H.*, who had been a director, might be ordered to pay £2000, the nominal value of certain shares in the company received by him from the promoter, or to make compensation on the ground of misfeasance. On the 25th of February, 1880, *H.* assigned the above debts to *T.* for value, *T.* knowing nothing of the

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claims against *H.*, and notice of the assignment was at once given to the liquidator. In July, 1880, an order was made on the summons for *H.* to pay £2000 to the liquidator. On the 4th of August, 1881, an order was made giving the liquidator liberty to declare a dividend of 11*s.* in the pound on the debts of the company. *T.* applied for payment of this dividend on the debts assigned to him, but the liquidator claimed to retain the dividend by way of set-off against the £2000:—

Held (affirming the decision of *Kay*, J.), that the liquidator had no such right of set-off, and that *T.* was entitled to receive the dividend.

THIS was an appeal of the official liquidator from a decision of Mr. Justice *Kay* (1).

The company was ordered to be wound up on the 12th of January, 1877. On the 12th of November, 1877, a certificate of debts was made. After this, six of the creditors whose debts had been allowed sold their debts to *J. E. Hütter*, and assigned them to him by deeds the earliest of which was dated the 27th of October, 1879, and the latest the 20th of December, 1879. *Thomas Greenhill* was also on the 12th of November, 1877, certified to be a creditor of the company for £4500.

On the 23rd of January, 1880, the official liquidator took out a summons against *Hütter*, who had been one of the original directors of the company, asking that he might be ordered to pay to the company £2000, the admitted nominal value of eighty-five shares received by him from *Charles Bernard*, the promoter of the company, with interest thereon, or that *Hütter* might be declared guilty of misfeasance and breach of trust in accepting the shares, and might be ordered to contribute such sum of money to the assets of the company by way of compensation in respect of such misfeasance and breach of trust as the Court might think just. The shares in question were part of a number of fully paid-up shares allotted to *Bernard* as part of the purchase-money of a concession sold by him to the company, and had been transferred by him to *Hütter*.

On the 25th of February, 1880, *Hütter* assigned for value to *Alfred Theys* the above debts, and also two judgment debts amounting together to £599 7*s.* 6*d.* due on judgments recovered against the above named *Thomas Greenhill*, and notice of the assignment was given to the liquidator and to *Greenhill* on the

(1) 22 Ch. D. 122.

following day. The judgment debts it appeared were secured upon a share of the moneys coming to *Greenhill* under his proof. *Theys* appeared to have had no notice of the claim against *Hütter*.

On the 31st of May, 1880, *Theys* took out a summons asking that the £599 7*s.* 6*d.* might be ordered to be paid to him by the official liquidator out of the moneys coming to *Greenhill*, and that the name of *Theys* might be entered on the list of creditors in the place of *Hütter* in respect of the £599 7*s.* 6*d.* and in respect of the claims of the six creditors who had assigned their debts as above mentioned. This summons was adjourned from time to time, and ultimately on the 23rd of July, 1880, no order was drawn up, but directions were given that the liquidator should retain any dividends coming to *Hütter* until further order.

On the 28th of July, 1880, an order was made on the summons of the 23rd of January, 1880, that *Hütter* should pay to the official liquidator the £2000, the nominal value of the eighty-five shares received from *Bernard*. This sum was not paid.

On the 4th of August, 1881, an order was made giving the official liquidator liberty to declare a dividend of 11*s.* in the pound on the debts. As to the dividends on the above six assigned debts, and on so much of *Greenhill's* debt as had been assigned to *Hütter*, and on a debt of £130 5*s.* due to *Hütter* himself, and on some other debts assigned to him but not included in the assignment to *Theys*, which dividends amounted to £1267 19*s.* 1*d.*, it was ordered that they should be paid into Court to a separate account.

Theys on the 27th of October, 1881, took out a summons asking that so much of the £1267 19*s.* 1*d.* as was payable as dividends in respect of sums included in the assignment of the 25th of February, 1880, might be paid to him. The official liquidator opposed this, claiming a set-off in respect of the £2000. The summons was adjourned into Court, and on the 11th of November, 1882, Mr. Justice *Kay* decided the case in favour of the applicant, holding that the official liquidator had no right of set-off or retainer against *Theys* in respect of the £2000 due from *Hütter* (1). The official liquidator appealed.

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Robinson, Q.C., and *Northmore Lawrence*, for the Appellant:—

The *Judicature Act*, 1875, s. 10, contains an enactment which renders the bankruptcy rules applicable in winding up, and that introduces the 39th section of the *Bankruptcy Act*, 1869, as to mutual credits. There is therefore a right of set-off, and this extends to unliquidated damages: *Mersey Steel and Iron Company* v. *Naylor* (1). If *Hütter* had been applying for these dividends the case against him would be clear, and his assignee cannot be in a better position. The assignee of a debt takes it subject to its equities: *Roxburghe* v. *Cox* (2). When *Hütter* assigned the debts the claim which ripened into a demand for £2000 was pending against him, and he could only assign subject to the right of set-off which existed against himself.

[EARL OF SELBORNE, L.C.:—Is there any authority for a right of set-off thus running with one of the demands?]

The case, so far as we can find, is new.

[FRY, L.J., referred to *Rawson* v. *Samuel* (3).

EARL OF SELBORNE, L.C.:—You are extending the bankruptcy rule to transactions after the date of what answers to the bankruptcy.]

There is a right of set-off independently of the Bankruptcy Act: *Ex parte Strang* (4).

[FRY, L.J.:—You are seeking to establish three rights of set-off—against the original creditor, the intermediate assignee, and the ultimate assignee, and putting each successive assignee in a worse position than his predecessors.]

If there is not a right to set off the debts there is a right to retain the dividends. When *Hütter* became transferee of these debts the company acquired a right to retain the dividends on them against his debt. By sect. 25, sub-sect. 6, of the *Judicature Act*, 1873, *Hütter* became entitled to sue for these debts in his own name, but only subject to the equities attaching on them, and he could only transfer subject to this equity, which was an equity affecting the dividends. Under Order XIX., rule 3,

(1) 9 Q. B. D. 648.
(2) 17 Ch. D. 520.
(3) Cr. & Ph. 161.
(4) Law Rep. 5 Ch. 492.

damages could be set off, and the right of set-off once acquired cannot be lost by a subsequent assignment by *Hütter*.

Beddall, contrà, was not called upon.

EARL OF SELBORNE, L.C.:—

This case has been argued with ingenuity and ability, but I feel no doubt that the order appealed from is right in substance. Mr. *Theys* is a *bonâ fide* purchaser for value, and it would be hard if he were deprived of what he has purchased; but if the law is so he must abide by it. The case is of this nature: *A.* proves a debt against a company. After his proof has been admitted he transfers the benefit of it *bonâ fide* for value to *B.*, and *B.* subsequently makes a *bonâ fide* transfer for value to *C.* *B.* is a debtor to the company, but the debt due from him was not established till after his transfer to *C.*, and the liquidator now claims to set off against *C.* the debt due from *B.* to the company. This may be law; but if so it is only matter of positive law not resting on any principle of justice, and we have now to decide whether it is law. It is urged that by the *Judicature Act* of 1875 the rules in bankruptcy are made applicable to companies in liquidation. The 10th clause of the *Judicature Act*, 1875, refers only to a company unable to pay its debts, but I am of opinion that it must be treated as applicable to any company in liquidation until it is shewn that the assets are sufficient for payment of the debts in full. Now under sect. 39 of the *Bankruptcy Act*, 1869, the line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions. A person comes in to prove a debt against the bankrupt's estate; if there are mutual credits between the bankrupt and the creditor, then an account is to be taken, and the balance is to be proved against the estate, or paid to the estate, as the case may be. Applying that rule here we have only to deal with the original creditor. He proved for a debt against which there was no set-off, for if there had been, the amount of his proof would have been diminished. The proof made was subject to diminution if it should afterwards appear that there was some other dealing between the company and the creditor before the liquidation

C. A. 1884 *In re* MILAN TRAMWAYS COMPANY. *Ex parte* THEYS. Earl of Selborne, L.C.

which would diminish the amount of proof. The right to the debt proved may be assigned. Suppose after the proof is made it is assigned to some one who is indebted to the company, can that person set off the debt proved against the claim which the company has against him? In my opinion clearly not. It is impossible that a person, who at the time of the bankruptcy owes a debt to the bankrupt and has no right of set-off, can acquire such a right by taking an assignment of another debt due to another creditor of the bankrupt.

Then as to the set off of dividends, there cannot be any set-off till a dividend is declared. These grounds would, in my opinion, be decisive even if there were nothing in the nature of the claim against *Hütter* to give them additional force. The Judge in the Court below said that the claim against *Hütter* was in the nature of unliquidated damages. If that be so, there could not be a set-off till the damages were ascertained. I should not myself say that the claim was for unliquidated damages, but it was a claim of such a nature as to come substantially to the same thing. *Hütter* was accountable to the company for the shares which he had received, and it was held that it had a right to charge him as a defaulting trustee with the value of those shares. The company elected to do so, and the claim against him then became a liquidated demand, but until that was done no right of set-off could arise.

COTTON, L.J.:—

This case has been well argued on behalf of the Appellant, but he has failed to persuade me that the order under appeal is wrong. The creditors whose debts have been assigned to *Theys* proved, and the certificate found the debts due to them. They assigned the benefit of their proofs to *Hütter*, against whom the company had a claim. Early in 1880 a summons was taken out in the winding-up to enforce this claim, and ultimately, on the 28th of July, 1880, it was established at £2000. In the meantime *Hütter* had assigned to *Theys* the debts which the creditors had assigned to him. *Theys* comes to ask for the benefit of the proofs, and this claim is resisted by the liquidator. The Lord Chancellor has disposed of the argument founded on the section

in the Bankruptcy Act. The Appellant also relied on this, that the company could say to *Hütter*, "you shall not receive anything from the assets till you have paid what you owe us." Probably the company could effectually say so. But *Hütter* is not coming here to claim anything from the company. *Theys* is coming to have the benefit of proofs made not by *Hütter* but by persons who, though they have transferred the benefit of their proofs, are the persons to whom the debts have been found due. The Appellant says that an equity attached to these debts in respect of *Hütter's* liability to the company, because the debts were assigned to him. The answer to that is that *Theys* is not coming here to enforce any right of *Hütter*, but the rights of the creditors who proved. It is said that the *Judicature Act*, 1873, s. 25, sub-s. 6, makes a difference. No doubt that enactment makes the assignment of a chose in action carry the right for the assignee to sue in his own name subject to equities. But there is nothing to prevent the ultimate assignee from suing in the name of the original creditors, free from any equities which only attach on the intermediate assignee. If there were any equity against the original creditors the case would be different. The appeal in my opinion fails.

Fry, L.J.:—

It is material in this case to consider the sequence of events. 1. Proof by the creditors. 2. Assignment by them to *Hütter*. 3. The summons taken out against *Hütter*. 4. The assignment of the debts by *Hütter* to *Theys*. 5. The order against *Hütter* to pay £2000. 6. The declaration of a dividend on the debts. Two contentions have been raised by the liquidator; first, he claims to set off the £2000 against the debts; secondly, to retain the dividends to meet that sum.

As to the first point there is no legal right of set-off, nor is there any equitable right to set-off, for equitable set-off can only arise where there is some equitable defence, or where one debt is legal and the other equitable. As to the debt of £2000, at the time when it became due, *Hütter* was not the owner of these debts; therefore at no time were the cross-demands between the same parties.

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Then, is there any right of set-off by reason of the 10th section of the *Judicature Act*, 1875, having imported into winding-up the 39th section of the *Bankruptcy Act*, 1869? That section refers to the state of things at the time of the bankruptcy. In *Dickson* v. *Evans* (1) Lord *Kenyon* says: "In cases of this sort the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change of situation of one of the parties." That has been the uniform rule. In the next place, I am not satisfied that the claim against *Hütter* comes within the description of mutual debts, credits, or dealings. In my view there was no debt till the order for payment of the £2000 was made, for the *cestui que trust* had a right to elect whether he would take the property or a money compensation for it, and till his election was made the demand was not a money demand. I think, therefore, that the clause in the *Bankruptcy Act* has no application.

Then, as to the claim to retain the dividends, the Appellant forgets that the dividend was not declared till after the order for payment of the £2000, and that the order for that payment was not made till after the assignment of the debts to *Theys*. We cannot hold that the fact of *Hütter* having once been the owner of these debts created an inchoate equity to set off whatever might be found due from him against the dividends to become payable in respect of those debts. No right to retain the dividends could arise unless at the time when they were declared they belonged to a person who was indebted to the company.

Solicitors for Liquidator: *Vallance & Vallance.*
Solicitors for *Theys*: *Lumley & Lumley.*

(1) 6 T. R. 57, 59.

H. C. J.

In re GARNETT ORME AND HARGREAVES' CONTRACT.

V.-C. B.
1883
Dec. 1.

[1883 G. 2539.]

Settlement—After-acquired Property—Implied Power of Sale—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (8), 38, 39, 45 (2).

By settlement (*a*), executed upon the marriage of *A.* and *B.*, it was declared that the trustees *C.* and *M.* should stand possessed of money upon trust that they and the survivor of them, his executors, administrators, and assigns, should continue the money on the present investments, or with the consent in writing of *A.* and *B.* or the survivor, and after the death of the survivor then of the proper authority of such trustees or trustee to sell and transfer the securities and lay out and invest the proceeds, with power from time to time with such consent as aforesaid to vary the securities. All after-acquired property, both real and personal, to be assured and settled upon the same trusts, &c., as the principal sum. Power to appoint new trustees, and to maintain, enlarge, or diminish the original number: every new trustee to have the power, &c., of the trustee in whose place he was appointed.

By settlement (*b*), executed upon the marriage of *C.* and *D.* (the sister of *B.*), it was declared that the trustees *M.* and *N.* should stand possessed of money upon trust to continue the same upon its then present security, or with the consent in writing of *C.* and *D.* or the survivor, and after the death of the survivor, of the proper authority of such trustees or trustee to call in the said principal money and again lay out the same in their or his names or name upon the securities therein mentioned, with power for the trustees or trustee for the time being with such consent or at such discretion as aforesaid to alter, vary, and transpose the stocks, funds, or investments to be from time to time made under the authority of the aforesaid power in any other stocks, &c., of the nature or description contemplated by the trust for investment. Covenant to settle after-acquired property similar in terms to that in settlement (*a*).

M. had died, and three new trustees of settlement (*a*) had been appointed by *A.* and *B.* *N.* was the sole present trustee of settlement (*b*).

Real estate had descended during their coverture upon *B.* and *D.* as coheiresses in undivided moieties. A contract for the sale of this real estate having been entered into by *A.* and *B.* and *C.* and *D.* as vendors:

Held, upon summons under the *Vendor and Purchaser Act*, 1874, that under the express power contained in settlement (*a*), and the implied power in settlement (*b*); the existing trustees of both settlements had full power within the meaning of the *Settled Land Act*, 1882, s. 2 (8), to act as trustees under the Act, and that it was not necessary to apply to the Court under the *Settled Land Act*, 1882, s. 38, for the appointment of new trustees for the purposes of the Act.

THIS was a summons under the *Vendor and Purchaser Act*, 1874, for the purpose of obtaining the opinion of the Court as to

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the validity of a contract for the sale by Mr. and Mrs. *Garnett Orme* and Mr. and Mrs. *Gandy*, as tenants for life, of certain settled property under the powers of the *Settled Land Act*, 1882.

By the settlement of the 25th of April, 1860, upon the marriage of Mr. and Mrs. *Garnett Orme*, it was declared that the trustees, *Richard Baxter* and *Henry Gandy*, should stand possessed of a sum of £13,000 upon trust that they and the survivor of them, his executors, administrators, and assigns, should continue the said sum on the present investments, or with the consent in writing of Mr. and Mrs. *Orme* or the survivor of them, and after the death of the survivor of them, then of the proper authority of such trustee or trustees, sell and transfer the stocks and securities, or any part or parts thereof respectively and lay out and invest the money to arise from such sales in their or his names or name in manner therein mentioned, with power for the trustees or trustee for the time being thereof from time to time with such consent as aforesaid to vary the securities, &c., to be from time to time acquired under the authority of the aforesaid power.

It was also provided that all estate whatsoever, both real and personal, exceeding at any one time £300 in value, to which Mr. or Mrs. *Orme*, or either of them in her right, should at any time during coverture become seised or possessed of or entitled to should be assured and settled—upon the same trusts and for the same intents and purposes, and under and subject to the same powers, provisions, and agreements as were thereinbefore expressly declared concerning the £13,200 thereby settled, or such part of the said trusts, intents, and purposes as should then be subsisting or capable of being executed, or as near thereto as the nature of the property and other circumstances would admit of, and until the said estate, property, and effects should be so settled and assured as aforesaid the same should be subject to such trusts, powers, provisoes, and agreements as aforesaid, and should be enjoyed accordingly. The settlement contained a power to appoint new trustees and to maintain or enlarge or diminish the original number of trustees, and a declaration that every new trustee should have the powers, &c., of the trustee in whose place he should be substituted.

By the settlement upon the marriage of Mr. and Mrs. *Henry Gandy*, dated the 27th of December, 1859, it was declared that the trustees, *Richard Baxter* and *William E. Maude*, should stand possessed of £10,000 upon trust to continue the same upon its then present security, or with the consent in writing of Mr. and Mrs. *Gandy*, or the survivor of them, and after the decease of the survivor, of the proper authority of such trustees or trustee, to call in the said principal money and again lay out the same in their or his names or name upon such securities as therein mentioned, with power for the trustees or trustee for the time being with such consent or at such discretion as aforesaid to alter, vary, and transpose the stocks, funds, securities, or investments to be from time to time made under the authority of the aforesaid power in, to, or for any other stocks, &c. of the nature or description contemplated by the trust for investment thereinbefore contained. A covenant to settle after-acquired property, exceeding in amount £300, similar in terms to that in Mr. and Mrs. *Orme's* settlement, was also contained in this settlement.

Richard Baxter died in June, 1880, and by deed of the 28th of April, 1881, Mr. and Mrs. *Orme* appointed three new trustees, who, with *Henry Gandy*, were now trustees of the settlement of April, 1860.

William E. Maude was the sole present trustee of the settlement of September, 1859.

Upon the death of their mother in 1879, real estates in *Lancashire* had descended upon Mrs. *Garnett Orme* and Mrs. *Gandy* as her co-heiresses in undivided moieties.

No conveyance of either of the undivided moieties had been made to the trustees of the marriage settlements.

On the 26th of June, 1883, a contract for the sale of a portion of this property was entered into between Mr. and Mrs. *Orme*, and Mr. and Mrs. *Gandy*, as vendors, and the purchaser Mrs. *Hargreaves* (with the consent of her husband).

Objections having been taken on behalf of the purchaser that no power of sale was given in either of the settlements to the trustees, the following questions arising upon the title were submitted to the Court:—

1. Whether the present trustees of the settlement of April,

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1860, were trustees with power of sale of an undivided moiety of the property contracted to be sold, and therefore, trustees of the settlement within the meaning and for the purposes of the *Settled Land Act*, 1882, or whether (as submitted on behalf of the purchaser), it was necessary in order to complete the title to such undivided moiety that new trustees should be appointed under sect. 38.

2. Whether the surviving trustee of the settlement of September, 1859, was a trustee with power of sale of an undivided moiety, &c., and therefore (as contended by the vendors), trustee of the settlement within the meaning and for the purposes of the *Settled Land Act*, 1882, or whether (as submitted on behalf of the purchaser), it was necessary in order to complete the title to such last-mentioned undivided moiety, having regard to sect. 45 (2), that trustees should be appointed of such undivided moiety under sect. 38.

Wolstenholme, for the vendors:—

Under both these settlements the trustees are trustees with a power of sale of settled land within the *Settled Land Act*, 1882, s. 2 (8), and it is unnecessary to apply to the Court under sect. 38 for the appointment of new trustees for the purposes of the Act.

On the actual words of the settlement of 1860 an express trust for sale has been clearly created, and although the settlement of 1859 is differently worded and contains a power "to call in the said principal money and again invest the same," this direction to invest amounts to an implied trust for conversion, and gives an implied power of sale: *Cornick* v. *Pearce* (1).

Assuming that there is an implied power of sale under the second settlement, the sole surviving trustee has power to sell and is capable of giving valid receipts for the purchase-money: *Settled Land Act*, 1882 (45 & 46 Vict. c. 38), s. 39 (2). It is objected that the tenant for life under the settlement of 1859, should have given notice of intention to sell to not less than two trustees according to sect. 45 (2), but that sub-section is qualified by the words "unless a contrary intention is expressed in the

(1) 7 Hare, 477.

settlement," and under the provisions of this settlement a single trustee is authorized to act.

Hamilton Humphreys, for the purchaser:—

It is extremely doubtful whether under these settlements, which both refer to personalty only, the legal estate of this descended real estate has vested in the trustees, and whether they are persons for the time being under a settlement trustees with power of sale of settled land within the *Settled Land Act*, s. 2 (8). Words authorizing trustees of personal estate to invest and vary the securities are not sufficient to give them an implied power of selling after-acquired real estate: *Hope* v. *Hope* (1). New trustees should be appointed under sect. 38, at least in Mrs. *Gandy's* settlement, where there is no trust for sale.

Wolstenholme, in reply.

BACON, V.C.:—

I have no difficulty in answering the question whether these trustees are trustees for sale within the meaning of the *Settled Land Act*, 1882. In Mrs. *Garnett Orme's* settlement there are the usual powers to the trustees with the consent of husband and wife to deal with the fund settled in the ordinary and proper way. Then the covenant to settle after-acquired property places whatever shall be afterwards acquired in exactly the same position as the original capital. That also applies to the other settlement (Mrs. *Gandy's*), although the words there are somewhat different, but the object and operation are identical. They are to call in and again lay out, alter, vary, and transpose, &c., and a power in the trustees to sell is quite within the trusts of the settlement. I can have no doubt that a good tenancy for life was created, and that the trustees had power to sell the trust property is the positive plain law. In the second settlement there is only one trustee surviving, but power is given to the trustees or trustee to act, and to receive and give receipts for capital given to him by the settlement. I cannot doubt, therefore, that this surviving trustee comes within the exception to sect. 39 (1), "unless the

(1) 1 Jur. (N.S.) 770.

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settlement authorizes the receipt of capital trust money of the settlement by one trustee," and the exception to sect. 45 (2), "unless a contrary intention is expressed in the settlement." The object of the two settlements is the same, and the operation of the words used is identical. In both cases the tenant for life has power to sell, and the trustees have full power to join in the conveyance, and to give receipts for the purchase-money, and it is not necessary that there should be any appointment of new trustees. The summons will be allowed.

Solicitors: *R. Smith & Wilmer; Johnston, Harrison, & Powell; Shaw & Tremellen*, for *Hall & Baldwin, Clitheroe.*

F. G. A. W.

V.-C. B. 1884 Jan. 11.

In re AGG-GARDNER.

Vendor and Purchaser — Copyholds—Enfranchisement—Acknowledgment of Right to produce Documents—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 96 [*Revised Ed. Statutes, vol. ix. p.* 651]—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 2; *s.* 9.

Copyhold land having been taken by a corporation under the powers of the *Lands Clauses Act*, and a draft conveyance from the copyholder being in the course of settlement, the corporation applied to the lord of the manor under sect. 96, for enfranchisement upon certain terms, which were agreed to. In settling the draft enfranchisement deed, the corporation claimed to have from the lord and his trustee to uses an acknowledgment of the right of the corporation to production of the documents of title to the manor, and of the Court rolls, relating to the hereditaments enfranchised, and to delivery of copies thereof, and, also from both, an undertaking for the safe custody of the same:—

Held, that the corporation were entitled to no more than an acknowledgment by the lord and his trustee of the right of the corporation to the production of the documents of title to the manor, and of the Court rolls, so far as they related to the hereditaments enfranchised, and to delivery of copies thereof; and an undertaking by the lord alone for safe custody.

Whether the corporation were entitled to so much as the above, *quære.*

THE corporation of the borough of *Cheltenham*, having taken certain house property, copyhold of the manor of *Cheltenham*, under the powers of the *Lands Clauses Act*, 1845, in their capacity of urban sanitary authority, the town clerk, in tendering to the

steward of the manor the draft conveyance from the copyholder to the corporation for enrolment, took occasion to ask what sum the lord of the manor would require for enfranchisement, which, by sect. 96 of the Act, is rendered compulsory. The steward answered that the lord would enfranchise the property for £55, to include all steward's compensation as well as the lord's, provided this were accepted at once. These terms were ultimately agreed to, and a draft conveyance in a form which had been settled by counsel, and was generally adopted in the manor, was sent by the steward to the town clerk.

The draft was between *James Tynte Agg-Gardner*, lord of the manor, of the first part, *Rowland James Ticehurst*, a trustee for the lord, of the second part, and the corporation of the third part, and the lord thereby purported to enfranchise the property to the corporation with usual covenants for title.

The town clerk returned the draft with the following addition, "And the said *J. T. Agg-Gardner* and *R. J. Ticehurst* hereby acknowledge the right of the corporation their successors and assigns to production of the deeds and muniments of title to the said manor, and of any and every the Court rolls of the said manor relating to the hereditaments hereby enfranchised, and to delivery of copies thereof, and hereby undertake for the safe custody thereof." The steward objected to the insertion of these words, whereupon the town clerk, on the 17th of November, 1883, took out a summons on behalf of the corporation, under the 9th section of the *Vendor and Purchaser Act*, 1874, for a declaration that the applicants, as parties to the above contract, were entitled to the insertion of an acknowledgment in the above terms.

On the 19th of November the steward wrote to say that if the town clerk had waited till after that day, his firm would have returned the draft, with the undertaking slightly varied, and this they could do now, if the town clerk would abandon the summons, but this course was not assented to.

The form of acknowledgment which the steward was prepared to offer was read in Court, and was as follows:—

"And the said *J. T. Agg-Gardner* and *R. J. Ticehurst* hereby acknowledge the right of the corporation their successors and

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assigns to the production of the deeds and muniments of title to the said manor, and of the Court rolls of the said manor, so far as they relate to the hereditaments hereby enfranchised, and to the delivery of copies thereof, and the said *J. T. Agg-Gardner* undertakes for the safe custody thereof."

Vernon R. Smith, for the summons.

Rawlinson, for the Respondent, the lord of the manor, submitted whether this was a contract within the 9th section of the *Vendor and Purchaser Act*, 1874.

THE VICE-CHANCELLOR said that he must hear the case, and observed that the Court had power to amend the description of the matter, if that were necessary.

Smith:—

Although no express authority has been found for the right here claimed by the corporation, the form in question is recommended in *Davidson's* Conveyancing (1), where there occurs also the following note:—

"The better course is to take the covenant for production by a separate deed; but when the property is small, it is not unusual to insert in the deed of enfranchisement a short covenant for the production, generally, of the Court rolls and title deeds of the manor, without specifying particulars."

This is the first we have heard of the form proposed to be offered.

Rawlinson:—

This is a large manor, and the form of enfranchisement tendered is one which has been commonly used. Strictly speaking, a lord of a manor and his trustee would not, in an ordinary case, be bound to give so wide an acknowledgment as is hereby demanded; and, as this is a purchase under the *Lands Clauses Act*, 1845, which renders enfranchisement compulsory, the lord might have tendered a draft conveyance in the form appended to the Act,

(1) 4th Ed. vol. ii. pt. I. p. 389.

which contains no covenants, acknowledgment, or undertaking of any kind.

If this were an enfranchisement by agreement, assuming that the purchaser would be entitled to some acknowledgment, and some undertaking, the demand here made is vexatious, inasmuch as the deeds would fill a moderate sized room. As to the undertaking for safe custody, it is unusual for the trustee to covenant at all.

In *Wolstenholme and Turner's* Conveyancing (1), the practice is thus laid down:—

"A person retaining documents is now enabled to give (1), an acknowledgment of the right to production, and (2), an undertaking for safe custody, together or separately. The first, unlike a covenant to the same effect, may safely be given by a trustee or mortgagee. He can always produce the documents while he has possession of them, and he ceases to be liable after he has parted with them. He should only give the acknowledgment, and not the undertaking. An ordinary vendor will be liable to give both, in absence of special contract." And further (2);

"The general rule is that a trustee does not covenant except for his own acts, and ought not to be asked to guarantee the safety of documents which might be lost without his personal neglect, as for instance, by his solicitor on a journey, when properly removing them. In this view trustees ought only to give an acknowledgment under this section, and not an undertaking. If they give an undertaking, any damages incurred could not, it is apprehended, in the absence of special provision, be recouped to them out of the part of the trust estate retained. But on purchase of an estate with deeds bound by an undertaking, the liability would be one attached by law to the estate, and in a proper case the trustees would be entitled to be recouped any loss."

That is submitted to the Court as a correct statement of the practice. But with regard to the necessity of an acknowledgment at all, sub-sect. 2 of sect. 3 of the Act provides that after enfranchisement, the purchaser of the freehold has no right to

(1) 3rd Ed. p. 44. (2) Page 47.

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call for the title to make the enfranchisement, so that any acknowledgment will be practically useless. Still for the sake of peace we were ready to offer an acknowledgment and undertaking in the form above stated.

Smith, in reply:—

The undertaking is not wider than the covenant for production by trustees given in *Davidson's* Conveyancing (1).

Bacon, V.-C.:—

I do not think the purchaser is in strictness entitled to an acknowledgment at all. The statute says that the purchaser of freeholds after enfranchisement has no right to look into the lord's title. A conveyance with an acknowledgment in the form suggested by the Respondents is, in my opinion, as much as the applicants are entitled to—and more. If under these circumstances people will rush into Court with demands of this kind, they must take the consequences.

The order will be that the lord of the manor being willing to give the acknowledgment in the form suggested—the summons will be dismissed with costs.

Solicitors: *Peacock & Goddard*, for *E. T. Brydges, Cheltenham; Merediths, Roberts, & Mills*, for *Ticehurst & Sons, Cheltenham.*

(1) 4th Ed. vol. ii., pt. 1, p. 670.

J. B. D.

In re MOIR.
WARNER *v.* MOIR.

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1884
Jan. 14.

[1882 C. 4503.]

Will—Devise of House and Grounds—Forfeiture in case of non-Residence—What will amount to Residence.

Testator devised a messuage and hereditaments in the country to the use of his son *G.* for life, "provided as a *sine quâ non*" that he "within six calendar months after my decease shall enter upon and take actual possession of" the messuage and hereditaments "as and for his residence and place of abode; and "shall as such tenant for life thereafter during his life continue to reside in or upon the same capital messuage for at least six calendar months (but not necessarily consecutively) in every year." After *G.*'s death "or his failing to take such possession as aforesaid and to reside in" the house, testator devised the same to *G.*'s first and other sons in tail male.

G. entered and took possession within six months after the testator's decease; but as to residence, during the year following the expiration of the six months, he was in the house for eighteen days only; and from the 1st of January to the 28th of December in the year following the date of such expiration, for no more than twenty-four days. He had, however, placed the house in charge of a staff of servants, he had paid the rates, he had kept horses and poultry in the stables and on the grounds, and his son, who was at a college near, had stayed at the house on an average on every alternate Saturday till Monday:—

Held, that no forfeiture of *G.*'s life estate had taken place.

ROBERT MOIR, of *Yannon, West Teignmouth, Devon*, by his will dated the 4th of August, 1875, gave and devised (*inter alia*), all certain before mentioned real estate, including "the capital messuage and residence called *Yannon*," and "all the lands and hereditaments of whatever tenure held therewith or deemed part or parcel thereof," unto his executors, *George Townsend Warner* and *Robert Alsop*, "their heirs and assigns," to the uses and upon and for the trusts and purposes following, that was to say: "To the use of, or upon trust for my son *George William Watts Moir*, during his natural life, without impeachment of waste, except in houses and buildings, provided as a *sine quâ non* that he my said son within six calendar months after my decease shall enter upon, and take actual possession of, the said capital messuage, lands and

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hereditaments of or known and comprehended by the name of *Yannon* aforesaid, as and for his residence and place of abode, and shall as such tenant for life, thereafter during his life, continue to reside in or upon the same capital messuage for at least six months (but not necessarily consecutively) in every year. And from and after the decease of my said son, or his failing to take such possession as aforesaid, and to reside in the said capital messuage and premises as aforesaid," to the use of his (testator's son's) first and every other son severally and successively in tail male. Testator further directed that all the household goods, furniture, prints, books, china, articles of *vertù*, and all his plate, jewels, and all other things in and about the said capital messuage called *Yannon*, should be annexed to the same capital messuage.

Testator died on the 5th of May, 1881.

A caveat against the grant of probate of the will having been entered in the Probate Division by the above-mentioned *George W. W. Moir*, an action was commenced in that Division against *George W. W. Moir* by the executors; and by an order in the action dated the 26th of October, 1881, it was ordered that *George W. W. Moir* should be at liberty to enter upon and take possession of the estate called *Yannon* before the 5th of November, 1881, and to do all other acts in and about the estate which he might be advised to be necessary, to avoid a forfeiture of his interest under the will, notwithstanding the appointment of an administrator of the personal estate and of a receiver; provided that he signed an inventory of the personal estate in and about the residence, and gave an undertaking not to deal with the same without further order. Under this order *George W. W. Moir*, having signed the inventory and given the undertaking, entered and took possession of the estate and hereditaments called *Yannon*, on the 4th of November, 1881.

Probate was granted to the executors on the 27th of March, 1882.

On the 27th of November, 1882, this action was commenced by the executors against *George W. W. Moir* and *George Herbert Cecil Moir*, his first son, a minor, by his guardian *ad litem;* and the statement of claim alleged that the first Defendant did not

continue to reside and had not resided in or upon the messuage called *Yannon* for at least six months in the year; and that his interest in the realty devised by the will, and in the heirlooms had determined; and claimed a declaration whether or not by reason of his non-residence at *Yannon* the first Defendant's estate in the realty and heirlooms had ceased.

The defence of *G. W. W. Moir* denied the above statement, and asserted that within six months after the testator's decease he had entered upon and taken possession of the messuage and premises (which was not denied), and had continued to reside upon the same for at least six calendar months in every year.

Upon this issue was joined.

The facts as to the residence were as follow:

During the year which followed the 4th of November, 1881, *George W. W. Moir* was on the premises eighteen days only; and from the 1st of January, 1882, to the delivery of the statement of claim (28th December, 1882) he had been there for twenty-four days only.

He had however paid the rates for the house and grounds; he had kept a staff of servants on the place; he had kept horses in the stables, and poultry in the yards and grounds: and his son, the co-Defendant, who was at a college near, had spent from Saturday to Monday, in every alternate week on an average, at the house.

Marten, Q.C., and *Dunning*, for the Plaintiffs, the trustees.

Millar, Q.C., and *Creed*, for the first Defendant, the tenant for life:—

In *Doe* v. *Steward* (1), where the gift was of a leasehold term in a house "in case" the legatee "shall continue to inhabit the house," and "from and after his giving up the possession of" the said house, over, the Court of Queen's Bench were perfectly clear that the man's going to sea for about six months, leaving his wife and family on the premises where she carried on the business, did not amount to "giving up possession."

In *Fillingham* v. *Bromley* (2), the direction being that every

(1) 1 A. & E. 300.

(2) T. & R. 530.

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person successively entitled should "live and reside on the estate," one of the persons entitled, after living and residing on the estate for about two years, went into another county for about a year, and then, having married, returned with his wife. During his absence he left the servants on board wages, and was assessed to the poor-rate. He afterwards again left, and discontinued to live and reside, except that he was in the habit of coming occasionally for a few weeks or months, sometimes with and sometimes without his wife and family. The Lord Chancellor (*Eldon*) said that, it being doubtful what the testator meant, the Court would not take upon itself to say there had been a forfeiture. He put the case of a resident in the country, who was a member of Parliament and had a house in London, and asked whether such a person could be said "not to live and reside" in the country.

"Residence has been decided not to require that a man shall actually sleep there every night;" per *Jessel*, M.R., in *Astley* v. *Earl of Essex* (1).

Thus the case is clearly covered by authority, and there has been no forfeiture.

Warmington, Q.C., for the second Defendant, the tenant in tail in remainder, a minor:—

The intention was to impose personal residence as a condition. It is not sufficient that the house was kept up, and the establishment kept going; what was meant was that a man should not have the prestige of being owner of the place without using it as his actual residence. This intention is shewn by the double condition—that of taking possession, and of residing.

The authority referred to by *Jessel*, M.R., in *Astley* v. *Earl of Essex* is *Walcot* v. *Botfield* (2), which precisely governs this case. There the condition was that the owner should reside for the period of six months in each year; and it was held that though it was not incumbent on him to pass 183 nights in the house, yet that he must be personally present in the house 183 days in each year, otherwise the estate would be forfeited; and the evidence shewing that he had not been present for 168 days in one year at

(1) Law Rep. 18 Eq. 290, 295. (2) Kay, 534.

the house, it was held to be forfeited accordingly. So that in this instance the condition has not been fulfilled, and a forfeiture has been incurred.

BACON, V.C.:—

Although the words of this will have not been fulfilled literally, there is no doubt in my mind that they have been substantially complied with. According to Mr. *Warmington's* argument, if a legatee is bound, in order to comply with the terms of a will, to reside at a certain place for six months, and, having resided there for three months, he comes to town and is unfortunate enough to break his leg in the *Strand* and is taken to a hospital, or being a lady who is in failing health, she is ordered to go for the winter to *Cannes*, or somewhere else, he or she would not have continued to reside, although the place mentioned in the will had been kept up as it is called during the legatee's absence, and although a complete staff of servants had been retained. The words in the will must be applied according to their sense and meaning; and their sense and meaning I take to be clear and plain.

The testator leaves to his son this house, on the condition that he shall reside in it, and this condition is imposed because he does not mean that his son shall be at liberty to let it to some strange person, or that he shall bring a stranger into his, perhaps, ancestral house. All that the testator meant to say was: "You shall not let the house, and to insure your not doing so you shall live there six months in the year." The words of the will are very plain. They say, it shall be a *sine quâ non* that my son shall, within six months after my death, enter upon and take possession of the house. This the son did; and he did it under somewhat remarkable circumstances. The obligations he was under being known, and the will then being the subject of litigation in another Court, under an order of that Court he was permitted, notwithstanding the appointment of a receiver, to take possession.

The will goes on to say that he shall continue to reside for six months, but not necessarily consecutively, in every year at the house. The very words of the will therefore provide for an occasional and accidental occupation. They preclude the idea that

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he was to live there for six months at a time in any one year. Well, but what does "to reside at" a house mean? To reside at a house means that a man is to be found at that house whenever he is wanted, that for that house he is rated to the poor-rate, or is on the parish or the Government rate-books, and that there he has a home. It is necessary, moreover, in order to comply with the conditions contained in the will, that the place should be kept up. Kept up it has been, for there is a staff of servants there, and the man's horses and poultry are there. Unless I am to read this will literally, and to say that unless he resides at this house for 180 odd days in every year he forfeits all benefit under his father's will, I think I must say the condition imposed by the will has been complied with. The Defendant has resided there; he did take possession; he has complied in all respects with the reasonable interpretation of the will, and there is no ground for saying that he has not done so.

There will be a declaration that the estate and interest of the Defendant, *George W. W. Moir*, in the realty and heirlooms devised and bequeathed by the will, has not ceased.

The costs of all parties, as between solicitor and client, will be borne by the estate.

Solicitors: *R. H. Willcocks*, for *Tozer & Whidborne, Teignmouth; Yarde & Loader*, for *Francis, Baker, & Watts, Newton Abbot.*

J. B. D.

In re GLENNY AND HARTLEY.

V.-C. B.
1884
Jan. 25.

Trustees—Power to appoint—"Continuing" Trustees—23 & 24 Vict. c. 145, s. 27 [Revised Ed. Statutes, vol. xiii., p. 919].

A trustee who has made up his mind to retire, may be a "continuing" trustee, until he has executed the deed appointing new trustees; and

Decision in *Travis* v. *Illingworth* (1) to the contrary, not followed.

By a settlement in 1867 (*Lord Cranworth's Act* having been passed in 1860), it was declared that it should be lawful for "the surviving or continuing trustees," in the event of any trustees declining to act, to discharge such trustees, and to appoint any new trustees; and it was provided that nothing should authorize the discharge of the only continuing trustees without the substitution of others. Of three original trustees, one having died, the other two, by deed in 1874, after reciting that they themselves "declined to act" and "desired to be discharged," and had "determined to appoint" three other persons to be trustees, "in exercise of the power for this purpose vested in them" by the settlement, appointed the three persons "to be trustees in the place of" themselves and the deceased trustee respectively:—

Held, that the appointment was good.

THIS was a summons taken out under sect. 9 of the *Vendor and Purchaser Act*, 1874, in the matter of a contract, dated the 20th of August, 1883, between *William Joseph Glenny*, a vendor, of the one part, and *Fountain John Hartley*, and two others, purchasers, of the other part, on the application of the purchasers, to have it declared that two appointments of new trustees made on the 26th of February, 1874, and the 7th of January, 1880, were not valid.

The deed containing the power of appointment was a marriage settlement dated the 7th of January, 1867, and the power was in the following terms:—

"And that it shall be lawful for the surviving or continuing trustees or trustee of these presents, or the heirs, executors, or administrators of the last surviving trustee, by any deed or deeds under their or his hand and seal, with the consent in writing of the said *William Joseph Glenny*" (the intended husband) "and *Sophia Breach l'Anson*" (the intended wife) "during their respective lives, and after the decease of either of them with the like

(1) 2 Dr. & Sm. 344, 346.

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consent of the survivor of them, in the event of any trustees or trustee dying, or going to reside beyond the seas, or declining or becoming incapable to act, to discharge such trustees or trustee from the trusts hereby declared, and all obligation and responsibility in respect thereof, and to appoint any new trustees or trustee or an additional trustee as the case may require; and the trustees or trustee so respectively appointed shall have and be invested with the same powers and authorities as if the trusts herein contained had been expressly reposed in them by these presents, and upon every such appointment the trusts, hereditaments, and premises shall be transferred accordingly; Provided, nevertheless, that nothing herein contained shall authorize the discharge of the only continuing trustees or trustee for the time being, without the substitution of another trustee or trustees, so that there may be at least one trustee to carry on the trusts of these presents."

The original trustees of the above indenture were three: named *John Samuel Phenè*, *Benjamin Bodman Breach*, and *Robert Watson*. On the 18th of February, 1873, *Robert Watson* died; and by the above-mentioned indenture of the 26th of February, 1874, which was made between *Phenè* and *Breach* of the one part, *William Joseph Glenny*, and *Sophia Breach Glenny*, his wife, of the second part, and *Frank Richardson*, *Alfred Walter Hewer*, and *William Henry l'Anson* of the third part, after reciting the settlement, and the marriage, and the death of *Robert Watson*, it was recited as follows:—

"And whereas the said *J. S. Phenè* and *B. B. Breach* respectively decline to act any further in, and desire to be discharged from the trusts of the hereinbefore recited indenture of settlement, and they at the request and with the consent of the said *W. J. Glenny* and *S. B. Glenny*, testified by their respectively being parties to and signing these presents, have determined to appoint the said *F. Richardson*, *A. W. Hewer*, and *W. H. l'Anson* to be trustees of the hereinbefore recited indenture of settlement in the place of the said *J. S. Phenè* and *B. B. Breach*, and *R. Watson*, respectively." The deed then witnessed that "in pursuance of the said determination the said *J. S. Phenè* and *B. B. Breach*, in exercise of the power for this purpose vested in them by the herein-

before recited indenture of settlement, and at the request and with the consent of the said *W. J. Glenny* and *S. B. Glenny* respectively, testified," &c., did thereby "appoint the said *F. Richardson*, *A. W. Hewer*, and *W. H. I'Anson* to be trustees for the purposes of the hereinbefore recited indenture of settlement in the place of the said *J. S. Phenè*, *B. B. Breach*, and *R. Watson*, respectively;" and then followed a conveyance of the trust property by *Phenè* and *Breach* to *Richardson*, *Hewer*, and *I'Anson*, upon the trusts of the settlement.

It was admitted by the Respondents that if the first appointment was invalid, the second appointment of the 7th of January, 1880, was invalid also.

Upon requisitions for title, the objection was taken on behalf of the purchaser that, inasmuch as the power to appoint new trustees was given to the "surviving or continuing" trustees or "trustee, or the heirs, executors, or administrators of the last surviving trustee," this power did not authorize an appointment by retiring trustees; and the vendor insisting that the appointment was valid, this summons was taken out.

Hemming, Q.C., and *Gover*, for the summons:—

The effect of the proviso is, that retiring trustees may go, if somebody else is substituted in their places, but not otherwise. Here the appointment purports to be exercised by retiring trustees, who are not within the power. Trustees cannot be at the same time both "continuing" and "retiring." The power is not given to retiring trustees. The same persons cannot retire and appoint at the same time: *Nicholson* v. *Wright* (1); *S.C.* under the name of *Nicholson* v. *Smith* (2); *Travis* v. *Illingworth* (3). The defect may in this instance easily be cured in the manner suggested by Vice-Chancellor *Wood*. All that *Phenè* and *Breach* have validly done is to express their wish to retire. Let them then retire one by one; when one has retired, the other can appoint, and then retire. Thus the power will be duly exercised. A continuing trustee is essentially diverse from a retiring trustee; neither is it competent to a man to discharge himself.

(1) 26 L. J. (Ch.) 312; 5 W. R. 431. (2) 3 Jur. (N.S.) 313.
(3) 2 Dr. & Sm. 344, 346.

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Marten, Q.C., and *Owen*, *contrà*:—

The appointment is perfectly good. The meaning of the word "continuing" has been misapprehended. In *Nicholson* v. *Wright* (1) the two persons had never acted as trustees at all; from the very beginning they had declined to act; and to speak of them as "continuing" was absurd. The particular wording of this power is sufficient to shew that in this instance at any rate, notwithstanding what was said in *Travis* v. *Illingworth* (2), the testator did contemplate the possibility of some of his trustees wishing to retire, and did give them the power to discharge themselves.

This construction is aided by the power given by *Lord Cranworth's Act* (23 & 24 Vict. c. 145, s. 27), taken together with the provisions of *Lord Brougham's Act* (13 & 14 Vict. c. 21, s. 4). [An unreported case of *Tozer* v. *Whidborne* (March 17, 1879) was also referred to.]

The test of the execution of a power is the intention of the appointor, who may exercise a power without referring or even alluding to it: *Sugden* on Powers (3); *Cuninghame* v. *Anstruther* (4), referring to *Scrope's Case* (5). Hence these appointors may be held to have exercised the statutory power, although they did not mention it; and having manifestly intended to make an appointment, must be taken to have exercised every power they possessed for that purpose.

Cases relating to the appointment of new trustees are reviewed by Lord *St. Leonards*, who, in a note (Powers (6)) observes of *Nicholson* v. *Smith* (7), that it is "a narrow construction"; and in *Pell* v. *De Winter* (8), Lord Chancellor *Cranworth* said he could not say he should be prepared to follow the decision in *Nicholson* v. *Wright*, though he would not give a definite opinion, as the point was not before him. The reasoning in *Travis* v. *Illingworth* appears to be defective. The Vice-Chancellor (*Kindersley*) says, no doubt truly, that the word "his" must refer to "a surviving or continuing" trustee, but he seems to have given no force to the word "or," and he gives no reason for saying that "a retiring

(1) 26 L. J. (Ch.) 312; 5 W. R. 431.
(2) 2 Dr. & Sm. 344, 346.
(3) 8th Ed. p. 289.
(4) Law Rep. 2 H. L., Sc. 223, 233.
(5) 10 Rep. 143 b.
(6) 8th Ed. p. 886.
(7) 3 Jur. (N.S.) 313.
(8) 2 De G. & J. 13, 17.

trustee cannot be regarded as a surviving or continuing trustee within the meaning of the power": see *Lord Camoys* v. *Best* (1).

Hemming, in reply, cited *Lewin* on Trusts (2), referring to *Stones* v. *Rowton* (3). This purports to be an execution of a recited power and nothing else, and cannot therefore operate under *Lord Cranworth's Act.*

BACON, V.C.:—

I am perfectly clear that the appointment in the deed of the 26th of February, 1874, was a good appointment, and that no objection to it can, for the purpose of this summons, be maintained.

The case arises under a distinction which has occupied a great deal of time in past years. But many of the difficulties which formerly existed have been removed by *Lord Cranworth's Act.* It cannot be said that the doctrine of powers, on which the valuable treatise of Lord *St. Leonards* was written, is one of the most creditable chapters in the history of our jurisprudence; but such as it is, it must be observed.

Here, however, the case is so plain as to render it almost impossible to suggest any doubt. The power is in these terms:—[His Lordship read the power, and continued:—] Is it possible for any rational man to misunderstand that provision? Then after that power to "the surviving or continuing trustees or trustee," or the representatives of the last surviving trustee, the instrument goes on to clog the power with this further proviso, that it shall not "authorize the discharge of the only continuing trustees or trustee for the time being" without the substitution of "another trustee or trustees," so that the estate shall never be left without protection. That power has been exercised in the present case. Now the first case that has been cited of *Nicholson* v. *Smith* (4) has no application, because in that case there never were any trustees—the persons appointed to act as trustees declined to act. The difficulty which is raised comes from the other decision of *Travis* v. *Illingworth* (5), in which "the surviving or continuing trustee or

(1) 19 Beav. 414.
(2) 7th Ed. p. 567.
(3) 17 Beav. 308.
(4) 3 Jur. (N.S.) 313.
(5) 2 Dr. & Sm. 344.

V.-C. B. 1884 *In re* Glenny and Hartley.

trustees, his executors, administrators, or assigns," was or were empowered to appoint a new trustee or new trustees to act in the room of a trustee or trustees, dying, or declining, or becoming incapable to act. The judgment of the Vice-Chancellor (*Kindersley*) is very clear and distinct. He decided that a man who has made up his mind to retire is not a "continuing" trustee. I do not hesitate to say, with all the respect—even the veneration—I feel for any decision of Vice-Chancellor *Kindersley*, I cannot adopt his conclusion. It seems to me that a man who has made up his mind to retire, is nevertheless a continuing trustee until he does retire. If he does retire, the deed expressly provides that the estate shall be protected by the appointment of a new trustee. If it means more than that, I cannot understand what it does mean. In this instance until the trustees signed the deed it seems to me they were "continuing" trustees. What their intention was can only be inferred from their acts. A man may make up his mind, and may afterwards change his mind. But whatever their intention was, up to the time of their executing the deed they were continuing trustees, and they were bound not to leave the settlement unprotected. To me it appears that it would be leaving the settlement unprotected, if I were to hold that there was any objection to the appointment of trustees in this case.

In August, 1860, before the date of the settlement, *Lord Cranworth's Act* had been passed, the difficulties attending the valid appointment of new trustees having rendered necessary that most wholesome enactment. The statute provides that whenever any trustee shall die or "desire to be discharged from" the trusts, then the surviving "or continuing trustees or trustee for the time being" may appoint. So that the statute contemplates the very case that has arisen here; and if the terms of the settlement in this case have not been complied with, as I think they have, the Act of Parliament comes in and supplies the deficiency.

There will be a declaration that in the events that have happened the two appointments are valid, and I order the purchaser to pay the costs of the application.

Solicitors: *Henry Gover & Son; R. S. Gregson.*

J. B. D.

DODDS *v.* TUKE.

V.-C. B.

1884

Feb. 15.

[1877 D. 130.]

Practice—Administration Action—Insufficient Estate—Trustee—Costs, Charges, and Expenses—Priority—Admissions between co-Defendants—Rules of Supreme Court, 1883, *Order* XXXII., *r.* 2.

If, in an action by *cestuis que trust* under a creditors' trust deed against their trustees for accounts, and to have the rights of the parties ascertained, the costs of all parties are ordered to be paid out of the trust fund, and it appears probable that the fund will not be sufficient for payment of all the costs in full, the trustees are entitled to a direction for payment of their costs, charges, and expenses in priority to the costs of all other parties.

Admissions between co-Defendants under Rules of Supreme Court, 1883, Order XXXII., r. 2, to which the Plaintiff is not a party, cannot be entered as evidence against the Plaintiff, and therefore cannot be included in an order for taxation and payment of the general costs of the action.

THIS was an action by the ultimate beneficiaries under a creditors' trust deed dated in 1863 for accounts against the Defendants, the two trustees, and to have the rights of the Plaintiffs and other persons under the deed ascertained.

By the judgment made on the 6th of June, 1878, necessary accounts and inquiries were directed.

By the order on further consideration dated the 22nd of November, 1883, but not yet drawn up, the costs of the Plaintiffs and the Defendants were directed to be taxed and paid as between solicitor and client, the costs of the Defendants to include any charges and expenses properly incurred by them as trustees.

The trust funds had been paid into Court by the trustees under orders made in the action, but it appeared probable that they would be insufficient for the payment of the whole of the costs in full.

Under these circumstances the Defendants now moved that the minutes of the order on further consideration as given out by the Registrar might be varied by the insertion of a direction that, if the trust funds mentioned therein were insufficient to pay the whole of the costs, charges, and expenses thereby directed to

V.-C. B. 1884 DODDS v. TUKE.

be taxed and paid, the costs, charges and expenses of the Defendants should be paid in priority to the costs of the Plaintiffs.

The motion also asked that the minutes might be varied by entering as read certain admissions of documents as between the two Defendants used on the hearing on further consideration, the Defendants having severed in their defences to the action.

Willis Bund, for the motion:—

I submit that where in an action of this nature it appears probable that the trust fund will prove insufficient for payment of all the costs of the action in full, the trustees are entitled to be paid their costs, charges, and expenses in priority to other parties. In the case of executors' costs of an administration action the rule is to direct them to be paid in priority, if it is probable that the estate will prove insufficient: *Wetenhall* v. *Dennis* (1); *Henderson* v. *Dodds* (2).

[BACON, V.C.:—In the case of legal personal representatives who are parties to an administration action, the Court is administering the estate, and therefore allows the representatives their costs in priority if the estate is insufficient for the payment of the whole of the costs in full. How do you make out that trustees are entitled to priority in an action of this kind?]

Because the trustees are protecting the estate, so that they are really in the same position as executors.

With regard to the admissions as between the co-Defendants, which were made on notice under Rules of the Supreme Court, 1883, Order XXXII., r. 2, I submit that they should be entered as part of the evidence used on the further consideration of the action and thus be included in the order as to costs.

Renshaw, for the Plaintiffs:—

This is in reality an application to vary an order your Lordship has already made. The priority now claimed was not asked for at the hearing; and, moreover, there is no authority to be found for giving such a priority to trustees. There is no *constat* that the estate is insufficient for payment of costs. As

(1) 33 Beav. 285. (2) Law Rep. 2 Eq. 532.

regards the admissions, the Plaintiffs were not parties to them, and therefore the Defendants cannot have the costs of them as against the Plaintiffs.

BACON, V.C.:—

Mr. *Renshaw* says that the trustees are not entitled to priority for their costs because it was not asked for at the hearing; but the trustees were entitled to their costs incurred in their character of trustees before the Plaintiffs may be said to have existed. It is a good rule that trustees should have a priority for their costs, because until those costs are provided for it is impossible to say what the trust fund is.

I therefore hold that these trustees are entitled to payment of their costs, charges, and expenses, in priority to the costs of all other parties, and the order must therefore be varied accordingly. Upon the second point, as to the admissions, I should like to hear you further, Mr. *Bund*.

Willis Bund, in reply:—

It is the duty of the Court to decide all questions between the parties to an action; that is to say, between co-defendants as well as between plaintiff and defendants; therefore admissions as between co-defendants ought to be inserted in this order on further consideration. Admissions really only take the place of witnesses called to prove the documents; and if in the present case witnesses had been called for that purpose it would certainly have been proper to state the fact in the order.

BACON, V.C.:—

The Plaintiffs were not parties to these admissions, which were solely between the co-Defendants. In my opinion, therefore, they cannot be entered as evidence as against the Plaintiffs, and consequently should not be included in the order as to costs.

Solicitors: *Crowdy, Son & Tarry; Satchell & Chapple.*

G. I. F. C.

KAY, J.
1883
Nov. 30;
Dec. 1, 11, 14.

In re BELLAMY.
ELDER *v.* PEARSON.

[1883 B. 5766.]

Husband and Wife—Chattels Real of Wife not vested in Possession during Coverture—Reversionary Interest of Wife after Life Interest in Leaseholds for Years—Wife predeceasing Tenant for Life—Title of Husband surviving.

A wife entitled to a term subject to a life estate therein predeceased her husband during the subsistence of the life estate :—

Held, that it was not necessary for the husband to take out letters of administration to her in order to complete his title to the leaseholds.

ADJOURNED SUMMONS.

By a deed of settlement, dated the 3rd of May, 1865, hereditaments held for long terms of years were assigned to trustees upon trust for *Ann Bellamy* for life, and after her death upon trust for *Charles Gamble* for life, and after his death upon trust for *Susan Patten*, for life, and "from and after the death of the said *Susan Patten*, then upon trust to assign and assure the said leasehold premises unto *Miriam Patten* for her own use and benefit absolutely."

Miriam Patten married *John Culmer* in September, 1870, and died on the 21st of December, 1882, leaving him surviving. No settlement was made on or had been made since the marriage. *Charles Gamble* and *Susan Patten*, the persons entitled to the second and third life interests in the leaseholds, died in the lifetime of *Miriam Culmer*, but *Anne Bellamy*, the person entitled to the first life interest therein, survived *Miriam Culmer*, and died on the 16th of January, 1883.

On the 3rd of April, 1883, *John Culmer*, and a person with whom he was in partnership, assigned all their real and personal property, both separate and joint, to *H. H. Elder*, upon trust for their creditors.

On the 30th of May, 1883, *John Culmer* took out letters of administration to the personal estate of his deceased wife.

Elder then, considering that this step was unnecessary to complete *Culmer's* title to the leaseholds, and that the costs thereby

incurred ought not to be allowed, took out an originating summons, under Order LV., rule 3, against *Pearson*, the trustee of the settlement deed of 1865, and *Culmer* asking that *Pearson* might be ordered forthwith to assign and convey the leaseholds to him, without requiring *Culmer* first to take out letters of administration to his wife, *Elder* thereby offering to pay *Pearson* his costs, charges, and expenses properly incurred as trustee. The summons also asked for a declaration that the taking out of letters of administration by *Culmer* to his wife's personal estate for the purpose of obtaining an assignment or conveyance of the leaseholds comprised in the settlement was unnecessary. This summons was adjourned into Court.

Hull, for the Plaintiff:—

It was not necessary for *Culmer* to take out letters of administra- to his wife's personal estate in order to complete his title to these leaseholds, for on her death her interest in them, though reversionary, was an assignable interest, and vested in her husband *jure mariti*. The distinction between the wife's chattels personal and her chattels real is clear and settled. No reduction into possession during the coverture is necessary as to her chattels real; and in this respect it makes no difference whether the term is legal or equitable. If this had been a reversionary *chose in action*, the husband surviving must have taken out letters of administration, but this being a vested interest in the chattels real, the husband could dispose of it whether it was in possession or reversion, and at her death it was his absolute property: *Donne* v. *Hart* (1); *Duberley* v. *Day* (2); *Archer* v. *Lavender* (3); *Davidson's* Conveyancing (4); *Lewin* on Trusts (5); *Josiah Smith's* Real and Personal Property (6); *Macqueen* on Husband and Wife (7); *Co. Litt.* (8); *Burton's* Compendium (9); *Cruise's* Digest (10); *Williams* on Executors (11).

(1) 2 Russ. & My. 360.
(2) 16 Beav. 33.
(3) Ir. Rep. 9 Eq. 220.
(4) 4th Ed. vol. ii. p. 220.
(5) 6th Ed. p. 616; 7th Ed. p. 638.
(6) 2nd Ed. p. 983; 4th Ed. p. 1125.
(7) 2nd Ed. p. 23.
(8) Page 46, b.
(9) 7th Ed. pp. 443, 444.
(10) Vol. vi. p. 480.
(11) 8th Ed. p. 701.

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1883
In re BELLAMY. ELDER *v.* PEARSON.

Vernon R. Smith, for *Culmer* :—

Culmer's title to these leaseholds was not complete without administration to his wife, for her interest being reversionary at the time of her death, it was necessary thus to reduce it into possession. The rule is stated in *Byth. & Jarm.* Conveyancing (1), as follows: "But if the wife had been possessed of or entitled to the residue of a term for years upon the determination of an interest for years carved out of it . . . . her husband might have assigned the term . . . . If the wife dies before the tenant for life, leaving her husband, he must administer to her before he can assign."

Here, too, as there was a life interest in a term of years with reversion to the wife, and a life interest is in the eye of the law a greater interest than a term of years, the husband could not be said to have had any interest in his wife's right during the existence of the previous life interest; and as the wife predeceased the tenant for life he had no interest during the coverture. This was only a contingent possibility until after the wife's death. The interest of the husband of a reversioner to a term of years, subject to a life interest, is analogous to the interest of a husband whose wife has been dispossessed of a chattel real, and it is clear that in that case he must recover the property during the coverture, or else he cannot make a title to it without administration: *Co. Litt.* (2); *Doe* v. *Polgrean* (3); *Donne* v. *Hart* (4); *Burton's* Compendium (5); *Grey* v. *Kentish* (6).

All the Court had before it in *Duberley* v. *Day* (7) was the fact that the interest in question could not by possibility vest during the coverture.

Charles Browne, for *Pearson* :—

Hull, in reply, referred to *Byth. & Jarm.* (8).

Dec. 11. KAY, J. :—

The question is whether it was necessary for Mr. *Culmer* to take

(1) 2nd Ed. vol. ii. p. 84, n.
(2) Page 351, a.
(3) 1 H. Bl. 535.
(4) 2 Russ. & My. 360.
(5) 7th Ed. p. 444.
(6) 1 Atk. 280.
(7) 16 Beav. 33.
(8) Vol. ix. p. 13.

out administration to his wife in order to complete his title to these leaseholds.

There is no doubt that as to all chattels real of the wife vested in possession during the coverture the husband surviving need not take out administration to the wife. And the rule is the same as to an equitable term.

The cases, which I have examined in the original reports, are collected in *Williams* on Executors (1). In the same place it is stated, "But to entitle the husband to the chattels real of the wife, which were not vested in his possession in her right in her lifetime, he must make himself her representative by becoming her administrator. As if a *feme sole* be possessed of a chattel real and be thereof dispossessed, and then take husband and die before recovery of possession, this right will not survive to the husband, but go to the personal representative of the wife."

The illustration there given seems to shew that the writer was referring to a mere right of action, and this is confirmed by the reference to *Co. Litt.* (2), where the words are, "Chattels real consisting merely in action, the husband shall not have by the intermarriage, unless he recovereth them in the life of the wife, albeit he survive the wife, as a writ of right of ward," &c., "whereunto the wife was entitled before marriage."

But then it is argued that if this be not a mere right of action, being an interest in remainder in leaseholds for years after a life estate, it is only a possibility, and so could not vest in the husband. *Lampet's Case* (3) is an authority for the proposition that such an interest was considered a possibility, which at that time could not be granted or assigned to a stranger during the life of the tenant for life, though it might be released to the person in possession. This, however, has long been overruled.

In *Donne* v. *Hart* (4) a reversionary interest after a life estate in leaseholds for years was held to be assignable by the husband of the reversioner during the existence of the life estate, and this although the reversionary interest was contingent. It is there stated that it is clear that the wife's contingent legal interest in

(1) 8th Ed. vol. i. p. 701.
(2) Page 351, a.
(3) 10 Rep. 46, b.
(4) 2 Russ. & My. 360.

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a term may be sold by the husband, and there is no difference in equity between the legal interest in and the trust of a term.

In *Duberley* v. *Day* (1) a reversionary interest in leaseholds belonging to a wife was held to be assignable by the husband, if it were of such a nature that it might by possibility vest in the wife in possession during the coverture, and the doctrine that such a reversion was a mere possibility of the wife, and as such could not be assigned, it was said is "undoubtedly exploded by the later decisions."

Accordingly I must take it to be settled that a vested reversionary interest, subject to a life estate in leasehold property, which might by possibility come into possession during the coverture is no longer treated as a mere possibility which is unassignable, but it is like any other chattel real of the wife in this respect at least, namely, that the husband can assign it during the coverture, and while it is still reversionary.

I am, therefore, unable to consider such an interest as a mere right in action, or indeed as a right in action in any true sense of those words, and consequently it does not seem to me necessary on principle or authority that the husband surviving (although the wife died before the interest vested in possession), should take out administration to the wife in order to complete his title.

The point seems to have been decided in *Doe* v. *Polgrean* (2). In that case *William Rawles*, being absolutely entitled to leaseholds for a long term of years, by an ante-nuptial settlement, assigned them to his intended wife and her heirs immediately after the death of him the said *W. Rawles*. The marriage took effect, the husband survived his wife and died intestate, and the defendant was his administratrix. The lessor of the plaintiff was the administrator of the wife. After a very learned argument, the Court of Common Pleas held that the settlement must be construed to be a present gift to the wife in case she survived her husband, to take effect in possession on that event, the right to the term therefore was in the husband and passed to his representative. That must mean that the executory limitation to the wife, although it could not take effect in possession during the

(1) 16 Beav. 33. (2) 1 H. Bl. 535.

coverture, was in the nature of a transmissible interest, if not strictly speaking vested, and that in order to entitle the husband surviving to such an interest of the wife in leaseholds for years, it is not necessary that he should take out administration to her.

According to *Hauchet's Case* (1) and *Wrotesley* v. *Adams* (2) a term of years of the wife is not divested out of her by marriage, but upon her death it is by law vested in the husband surviving her.

In *Bracebridge* v. *Cook* (3) "the Court held the law to be that if a man who has a lease for years grants his term to a *feme covert* and another, or if a *feme sole* and another are joint tenants for years, and she takes husband, the jointure is not dissolved but continues, and the survivor of the wife, or of the stranger, shall have the whole term in that case, because a term for years is a chattel real, in which case the marriage of the wife shall not divest the term out of the wife, but she has an estate in it as she had before, so that if a stranger ousts them the wife ought to join with the husband in bringing an *ejectione firmæ*, and the wife shall have judgment as well as the husband. And if a woman who has a term for years takes husband, the husband cannot devise the term to another by his testament, for the wife at the time of his death, and before his death, had an estate in her, which shall prevent the devise and frustrate it; and if the husband in his lifetime had granted a rent-charge out of the term, the wife survivor should avoid the charge and all other incumbrances, for she being the survivor is remitted to the term which the coverture does not divest out of her. But otherwise it is of chattels personal, for it a woman who has personal goods takes husband the law divests the property out of the wife and vests it in the husband only." That case was followed by Sir *George Turner* in *In re Barton's Trusts* (4).

It is obvious from these citations that the law on the subject is quite arbitrary. Though the term is not vested in him the husband can assign, but he cannot devise or charge his wife's leaseholds against her surviving. If he survives, upon her death

(1) 2 Dyer, 251, a.
(2) Plowd. 187, 192; Roll. Abr. Baron & Feme, H. 8.
(3) Plowd. 416, 418.
(4) 10 Hare, 12.

KAY, J. 1883 *In re* BELLAMY. ELDER *v.* PEARSON.

they vest in him. There seems to be no reason why an executory interest of the wife in the nature of a remainder should not also vest in the husband on the wife's death, as was decided in *Doe* v. *Polgrean* (1).

Dec. 14. The case was again mentioned, and an order was made declaring that it was unnecessary for Mr. *Culmer* to take out letters of administration to his deceased wife in order to make a title to the leaseholds in question, and directing the Defendant *Pearson* to assign them to the Plaintiff on being paid his costs of the summons and his charges and expenses as trustee.

Solicitors: *George Brown, Son, & Vardy; H. J. Skinner; Surr, Gribble, Bunton, & Gribble, for Stiff, Eastbourne.*

W. W. K.

KAY, J. 1884 *Jan.* 24.

WEBSTER *v.* PATTESON.

[1881 W. 4739.]

Practice—Mortgagor and Mortgagee—Foreclosure—Receipt of Rents by Mortgagee before Final Judgment—Opening Foreclosure—Further Account.

In an action by executors of a mortgagee against the mortgagor and a puisne mortgagee an order *nisi* for foreclosure was made, giving successive periods of redemption. After the time fixed for redemption and before final judgment was obtained against the puisne mortgagee, and before the expiration of the time allowed to the mortgagor, the Plaintiffs received a sum of money for rent. A further account had been taken against the mortgagor, and a further day fixed for redemption by him:—

Held, that it was irregular to fix a further time for the mortgagor to redeem until the puisne mortgagee had been finally foreclosed; and that the receipt of moneys for rent after the time fixed for the puisne mortgagee to redeem and before final judgment obtained against him did not open the foreclosure against him.

The order was to foreclose the puisne mortgagee absolutely, and to take a further account against the mortgagor.

THIS was a foreclosure action commenced in November, 1881, by the two executors of a mortgagee, who had taken possession of the estate, against the mortgagor, and a puisne mortgagee. The

(1) 1 H. Bl. 535.

usual judgment for successive redemptions or foreclosures was pronounced by the late Vice-Chancellor *Hall* in January, 1882. After the six months from the date of the Chief Clerk's certificate, 20th of May, 1882, allowed to the puisne mortgagee for redemption, but before final judgment obtained against him, and before the expiration of the time allowed to the mortgagor, the Plaintiffs, on the 27th of November, 1882, received a sum of money for rent due. A further account was ordered against the mortgagor, a second certificate dated in February, 1883, made, and a further day fixed for him to pay the principal and interest certified to be due, viz., the 26th of May, 1883.

Bardswell, for the Plaintiffs, now moved *ex parte*:—

I admit that as regards the mortgagor, the receipt of the moneys for rent opened the foreclosure. The question is whether such receipt opened the foreclosure as against the puisne mortgagee, and, if it has not done so, whether this is the proper time to move for final judgment against him, or whether the Plaintiffs must wait some time longer before moving. I submit, however, that the judgment for foreclosure against the puisne mortgagee should be now made absolute. The decision in the case of *Whitbread* v. *Lyall* (1) is on all fours with this case, and is conclusive that judgment for foreclosure against him can now be made. As to the taking of a further account, there is the case of *Constable* v. *Howick* (2), where the mortgagee received some rents before obtaining the usual order for final foreclosure, and there Vice-Chancellor Sir *W. Page Wood* did not think that any further account was necessary, but made the order asked for. Then there is the case of *Prees* v. *Coke* (3), a case of mortgagee and mortgagor simply, where it was held that a foreclosure is not complete until the final order has been made, and that it cannot be obtained if rents have been received by the mortgagee since the account was taken; but here there is a puisne mortgagee, and as against him final judgment can, I submit, be given, if not against the mortgagor.

(1) 8 D. M. & G. 383. (2) 5 Jur. (N.S.) 331.
(3) Law Rep. 6 Ch. 645.

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1884
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KAY, J.:—

I think it was irregular to fix a further day for redemption by the mortgagor until the puisne mortgagee had been finally foreclosed, but I have no difficulty in holding that the receipt of moneys for rent by the Plaintiffs after the time fixed for redemption by the puisne mortgagee, and before final judgment had been obtained, did not open the foreclosure as regards him; therefore the proper order to make now will be to foreclose him absolutely, and to direct an account against the mortgagor.

Solicitors: *Burton, Yeates, Hart, & Burton,* agents for *E. M. Beloe, King's Lynn.*

T. F. M.

DUNN *v.* FLOOD.

NORTH, J.

1883

Nov. 21

[1882 D. 2790.]

Vendor and Purchaser—Depreciatory Conditions—Commencement of Title—Recitals to be Evidence—General Power of Entry too remote.

Trustees for sale under a will put up, in 1882, certain lands for sale by auction with conditions that the title should commence with the conveyance to the testator in 1872, and that every recital or statement in any abstracted document should be conclusive evidence of the fact or matter recited or stated. The purchaser objected to complete on the ground that these were depreciatory conditions, and also that the property was subject to certain restrictive covenants contained in a conveyance in fee, but not sufficiently disclosed by the conditions, and to a power of re-entry in case of breach of the covenants not mentioned in the conditions:—

Held, that, under the circumstances, and as there would have been no difficulty in shewing an earlier title, the conditions limiting the title to the conveyance of 1872, and as to the recitals being evidence, were not justifiable, and that the contract could not be enforced:

Held, however, that an unlimited power of re-entry in the event of the breach of a covenant was void as being too remote, and was no objection to a title.

JAMES NOBLE, by his will, devised all his real estate to trustees, *B. Dunn* and *James Wicks*, upon trust after the decease of his wife (which happened in his lifetime), at the discretion of the trustees, to sell the same and to invest the moneys produced by the sale as in the will mentioned.

James Noble died in August, 1882, and in November, 1882, the trustees caused his real estate to be put up for sale by auction in thirty-three lots. As to Lots 2 to 33, which were parts of a piece of land at *Reading*, the 4th condition was that the vendors would deliver an abstract of title commencing with an indenture of conveyance from *J. H. Johnson* to "*James Noble*, dated the 2nd day of October, 1872; and every recital or statement in any abstracted document shall be deemed conclusive evidence of the fact or matter recited or stated therein or to be assumed or implied therefrom." The 6th condition stated that the respective lots were sold subject to the existing tenancies, restrictive covenants, and other incidents of tenure (if any), and that the respective purchasers were to covenant accordingly. There were also

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what were called "general conditions," that the purchasers should covenant to observe certain building lines and erect certain fences, and not to carry on the trade or business of a hotelkeeper or other trades, following the words of the covenant in the deed of the 1st of June, 1872, hereafter set out. According to the evidence for the Defendant, it was stated by the auctioneer that the restrictive covenants were included in the general conditions.

C. J. Flood at the auction bid for and was declared the purchaser of several lots at the price of £702 10*s.*, on which he paid a deposit.

Flood objected to complete, and alleged, what was not disputed, that the title was as follows: *John Harris*, who died in 1823, devised this piece of land (subject to several life annuities which had come to an end) to his wife for her life, and after her death to trustees upon trust for sale. She died in 1871, and on the 22nd of April, 1872, the piece of land was sold and conveyed by the trustees to *H. A. Simonds, H. J. Simonds*, and *B. Simonds*, brewers of *Reading*. By an indenture, dated the 1st of June, 1872, Messrs. *Simonds* conveyed the piece of land to *J. H. Johnson*, who thereby covenanted that he, his heirs and assigns, would not carry on, or permit to be carried on, upon the premises, the trade of brewer, hotelkeeper, innkeeper, victualler, vintner, or dealer in wines, spirits, or beer. And that in case any breach of that covenant should be committed it should be lawful for the vendors to enter upon the premises, or any part thereof whereon such breach should have been committed, and to occupy and possess the same for their own benefit, until the trade or business so carried on should be discontinued, and also for the space of three calendar months from the time of such discontinuance: provided always, that this covenant should not extend to charge any messuage or premises other than the particular messuage or premises on which such breach of covenant should have been committed. On the 2nd of October, 1872, *J. H. Johnson* conveyed the piece of land to *James Noble*, the testator of the vendors. In each of the conveyances were covenants for the production of the earlier deeds, those deeds not being delivered to the purchaser.

The purchaser's objections were, 1, that the vendors being trustees for sale ought not by the conditions to have limited the title to the conveyance of the 2nd of October, 1872; 2, that the condition of re-entry in the deed of the 1st of June, 1872, was not referred to in the conditions, and was a defect in the title; 3, that the extent of the restrictions did not sufficiently appear on the conditions.

The vendors thereupon brought this action, claiming specific performance.

Everitt, Q.C., and *MacSwinney*, for the Plaintiffs:—

The Defendant knew that he was purchasing from trustees for sale, and that he was to take a title beginning in 1872. This was the only deed in the possession of the trustees, and in order to save expense they very properly made that the beginning of their title. It was a purchase-deed, and not, as in *Dance* v. *Goldingham* (1), a settlement, or, as in *In re Marsh and Earl Granville* (2), a voluntary deed which might be avoided. As to the objection on account of the right of re-entry, the purchaser was aware of the restrictions, and the re-entry is merely a means of enforcing them. Besides, the power of re-entry is at law void as a perpetuity: *Flower* v. *Hartopp* (3); *Lewis* on Perpetuities (4); *London and South Western Railway Company* v. *Gomm* (5).

W. W. Karslake, Q.C., and *W. H. King*, for the Defendant:—

Where the trustees have exercised their discretion as to conditions, the Court will not interfere, but here they have exercised none, and there was no reason why the earlier title should not be given. Such a condition must tend to deter purchasers, and must entirely stop trustees from bidding. A ten years' title is very short and unusual. As to the power of re-entry, such a power does not come within the rule; it is incident to many estates.

[NORTH, J:—The 4th condition as to the recitals in a deed surprises me.]

(1) Law Rep. 8 Ch. 902.
(2) 24 Ch. D. 11.
(3) 6 Beav. 476.
(4) 616, Supp. 201.
(5) 20 Ch. D. 562.

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MacSwinney, in reply:—

It is very common in small sales, and is little more than what is enacted by the *Vendor and Purchaser Act*, 1874: *Bolton* v. *London School Board* (1).

NORTH, J.:—

The first point I am going to dispose of is that with respect to the power of re-entry, which arises under these circumstances. In a deed made on the 1st of June, 1872, which was antecedent to the date fixed for the commencement of the title, there is a covenant not to carry on certain trades, and a power, in case any breach or breaches of that covenant shall be committed, for the vendors to enter upon the premises and to hold, occupy, possess, and enjoy the same, and the rents thereof, and receive and take for their own use and benefit until the trade or business so improperly carried on shall be discontinued, and also for a further space of three calendar months from the time of such discontinuance: then further on in the deed there is a proviso that that clause is to be read *reddendo singula singulis*, it is only to be exercised as regards that particular portion of the premises upon which any breach might happen to take place. It is to be observed that the power to re-enter, hold, possess, and enjoy, is one which, according to its language, may come into operation at any time whatever, so that there is no limit of time fixed during which it is to apply—no limit to prevent its being a claim in perpetuity. The question is whether that is a power to which any effect can be given. I have been told that it is a nice point which will be raised, and will most probably be a matter of contest. But it does not appear to me to be a point admitting of any doubt. It seems to be completely settled by authority. It is sufficient for this purpose to refer to what is laid down by the Court of Appeal, and more particularly by the late Master of the Rolls, in the case of *London and South Western Railway Company* v. *Gomm* (2). The Master of the Rolls says, "I do not know that I can do better than read the two passages cited in argument from Mr. *Lewis's* well-known book on Perpetuities (3). He cites

(1) 7 Ch. D. 766.

(2) 20 Ch. D. 581.

(3) Page 164.

with approbation this passage from Mr. *Sanders's* Essay on Uses and Trusts: 'A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee-simple of the property discharged of such future use or estate before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity.' Then Mr. *Lewis* adds these words: 'In other words a perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation.'" That definition was adopted by the Court and applied to the state of circumstances then before the Court, and it seems to me entirely to govern the case now before me, because the interest to arise under this power of re-entry is executory, and will not "vest until after the expiration of, or necessarily within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation." It seems to me that this comes precisely within that definition, and therefore it is too remote, to use the common phrase, and cannot be put into force. Mr. *Karslake* says that no case has gone the length of deciding that this applies to the state of things arising with respect to the interest, so to call it (in an indirect sense), which a person has under a negative covenant not to deal with the property in a certain way. To make such a case an exception to the general rule I should want an authority. It is not sufficient to say that the general law has not been applied to that particular case; if an exception is to be made to the general law, I must have some ground for making it. No such authority has been produced, and in principle I see no reason whatever why there should be such an exception from the general law. On that ground I think that the time has arrived when I can properly express an opinion

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that this power is not binding, and that I cannot act on the footing of its existence. I must say further that, independently of that consideration, I should have been very reluctant to refuse specific performance on that ground when it was clear that the person who took the estate could not be injured by the exercise of the power unless through a breach of covenant on the part of that particular person. If it had been necessary to decide the case upon that point, I should have decided that this was not an objection to specific performance.

But there is the other part of the case, which relates to the objection that the trustees have not exercised their power in the way in which they ought to exercise such a power. Now, taking the definition given by Lord Justice *James* in *Dance* v. *Goldingham* (1), the question for me to consider is whether the case comes under the law as laid down by him there. He says (2): "I have always understood it to be the law, consistently with authority and principle, that, however large may be the power of trustees under their trust deed to introduce conditions limiting the title, and other special conditions, which have, or are calculated to have, a depreciatory effect on the sale, they are bound to exercise them in a reasonable and proper manner—that they must not rashly or improvidently introduce a depreciatory condition for which there is no necessity." In the present case no one suggests that the trustees or their solicitors have done anything that was not in good faith, and what they really considered might be a saving of expense to the estate. But the question is, whether I can say that the purchaser would be free from any possibility of objection on the part of the *cestuis que trust* of this property, by reason of the trustees having exercised their power in the way in which it was exercised by them.

There are three things which seem to me to shew that these conditions are not right. What I might have said with respect to any one of them if alone, I need not discuss, but looking at the three together, I certainly think that the conditions are not such as that the contract ought fairly to be forced upon a purchaser. The three things are: first, the date of the commencement of the title; secondly, the want of harmony between the

(1) Law Rep. 8 Ch. 902. (2) Law Rep. 8 Ch. 909.

6th condition and the general conditions as to the restrictive covenants; and thirdly, the condition making recitals evidence. Now if the second had been the only point, viz., that the restrictive covenants mentioned in the general conditions are not identified—are not shewn to be co-extensive with the restrictive covenants mentioned in the 4th condition, I think I could have got over it; but still it is a circumstance which deserves notice. Looking at all three together, I must say that I do not think the trustees have done what they ought to have done in selling this estate. It is said that they have framed the conditions in this way to save expense. I daresay they have done so, but it would have saved still more expense if they had stipulated that there should be no title whatever. No one, however, would suggest that that would be a condition which the trustees would under the circumstances have been justified in imposing upon intending purchasers.

Looking then, first, at the question of title. I do not see any sufficient reason for limiting the abstract to the conveyance to the testator of the vendors. There is nothing whatever to shew that there was any difficulty in getting at the earlier deeds, and though no doubt the two immediately preceding deeds may only carry the title back six months or so, yet I do not think it would be an immaterial matter in selling property of this kind if it was known and stated in the conditions of sale that the title would commence with a purchase and a subsequent sale by persons so well known in *Reading* as Messrs. *Simonds* the brewers, and also that there had been three different transfers of the property within the ten years to which the title was limited, all for valuable consideration. It seems to me, therefore, that the reason given for not going further back is not a sufficient reason. Whether it might have been desirable under the circumstances to go back to *Harris's* will is a different matter. I can easily believe that the title might have commenced with the conveyance from Messrs. *Simonds*, accompanied by such explanations as would justify the trustees in not going further back. They might have taken another course, and have gone back to *Harris's* will, and though there might have been some special provisions as to the deaths of the annuitants, I do not think that they would

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have caused much trouble. Either of those courses was open to them, but I do not think that what they have done was in accordance with their duty to the testator's estate.

Then there is the question as to the restrictive covenants, which, as I have said, is a circumstance to be looked at, though it might not of itself be sufficient. And thirdly, there is the condition that every recital shall be conclusive evidence, which I cannot think justifiable. In the present case I do not find anything to justify that condition. It is not necessary for me to say that no trustee could, under any circumstances, properly introduce such a condition, but the circumstances, in order to justify it, must be very special, and I find no such circumstances here. The *Vendor and Purchaser Act*, 1874, only refers to recitals in documents twenty years old; it does not make even those conclusive evidence.

On the whole, I think that this sale cannot be enforced by an action for specific performance; and the claim must be dismissed with costs.

Solicitor for the Plaintiffs: *H. D. Marshall, for Beale & Martin, Reading.*

Solicitor for the Defendant: *G. T. Powell, for F. Elkins, Reading.*

C. M.

NORTH, J. 1883 *Nov.* 22, 23; *Dec.* 21.

FARRER *v.* LACY, HARTLAND & CO.

[1882 F. 2311.]

Mortgage—Costs of Abortive Sale—Cheque for Deposit dishonoured—Practice of Auctioneers—Foreclosure—Personal Order for Payment—Form of Order.

The custom of auctioneers to accept, on sales of large properties, a cheque in lieu of cash for the deposit, is reasonable, and a mortgagee-vendor was held to be justified in acting on it, and not to be guilty of negligence in the conduct of the sale, though the cheque was dishonoured.

In such a case a mortgagee, who has endeavoured to sell under his powers, is entitled to add the costs of the abortive sale to his security.

The proper order in a foreclosure action, when an account and an order

for personal payment of what may be found due is asked for against the mortgagor, is to direct payment of principal and interest within one month after the date of the Chief Clerk's certificate on the taking of the accounts.

Semble, if a mortgagee wants an immediate order for personal payment, he must ask for it by his pleadings and prove the amount due for principal and interest at the trial.

BY deed dated the 17th day of May, 1879, and made between *D. Myers* and *J. Myers* of the one part, and the Defendant *Day* of the other part, certain business premises at *Lambeth* were demised to the Defendant *Day* from the 24th of June, 1879, for forty-four years at the rent of £375 per annum.

By deed dated the 1st of May, 1881, and made between the Defendant *Day* of the one part, and the Plaintiff of the other part, the premises comprised in the said lease were demised by the Defendant *Day* to the Plaintiff for the residue of the said term less one day to secure £8000, then advanced by the Plaintiff to the Defendant *Day*, with interest at £5 per cent.

At this time the property was alleged to be worth about £20,000, and the Defendant *Day* afterwards created several subsequent incumbrances to a considerable amount, of which due notice was given to the Plaintiff.

On the 2nd of November, 1882, the principal with considerable arrears of interest being due to the Plaintiff on his security, the Plaintiff in pursuance of the power of sale contained therein put up the property for sale by public auction in the usual way, subject to the usual conditions of sale as to payment of the deposit.

Prior to the sale the auctioneer having been requested by the Defendant *Day* to limit the amount of the deposit to £1000, announced in the auction room, with the consent of the Plaintiff, that he was prepared to take a deposit of £1000 if £10 per cent. on the purchase-money exceeded that amount; and the sale proceeded on that footing.

The property was knocked down to a Mr. *Peach* for £15,900, and on signing the contract for purchase he gave his cheque on his bankers for the £1000 deposit, and also then stated himself to be acting as the duly authorized agent of a Mr. *Elliott*. The cheque was in due course presented the next morning to the

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bank on which it was drawn when the payment thereof was refused by the bank on the ground that the cheque had been stopped.

On hearing that payment of the cheque had been refused, the Plaintiff, on the 15th of November, 1882, wrote to Mr. *Elliott*, who in reply repudiated the purchase, stating that he had never authorized anyone to bid for the property for him at the sale, and consequently that he never gave any cheque for payment of the deposit.

On the 8th of December, 1882, the Plaintiff commenced this action against *Day*, and the puisne mortgagees, and Mr. *Elliott*, claiming a declaration that no valid contract of sale had been made to *Elliott*; an account of what was due to the Plaintiff for principal, interest, and costs, under his security, including his costs, charges and expenses of the abortive sale; payment for what was due; and foreclosure or sale of the mortgaged premises.

The action was subsequently dismissed as against *Elliott*, and his taxed costs, amounting to £15, were paid to him by the Plaintiff.

The other Defendants by their respective statements of defence alleged that the sale had not been properly conducted, and that the Plaintiff was guilty of wilful default and negligence in the conduct of the sale in that he authorized or allowed the auctioneer to take, in lieu of a cash deposit of £10 per cent., a cheque which on presentation in due course was dishonoured, and in that the amount of such cheque was less than £10 per cent. of the purchase-money as provided by the conditions of sale.

The Plaintiff in reply alleged it was a well established and universal custom of auctioneers in and in the neighbourhood of *London* to accept cheques for the payment of deposits on sale by auction, and that there was no breach of duty on the part of the auctioneer in accepting the cheque for the £1000, and no loss was occasioned to the Defendants, or any of them by the auctioneer having accepted the cheque. The Defendant joined issue on the reply.

This was the trial of the action.

It appeared from the evidence that *Peach* was a man of straw, and had no authority to buy as agent for *Elliott*. It also

appeared that it was and for upwards of forty years had been the invariable practice of auctioneers in sales of estates and other properties of large value to accept the purchaser's cheque for the deposit, whether he was known to them or not, without any inquiry as to his stability or *bona fides*.

W. Barber, Q.C., and *Lewin*, for the Plaintiff:—

This would have been a short cause but for the contention raised by the Defendants. There has been no negligence in the conduct of the sale. The custom of auctioneers, as proved, to accept a cheque for the deposit is reasonable and proper. We ask for a sale, and submit that the Plaintiff is entitled to add the costs of the abortive sale to his security.

E. B. Cooper, for the Defendants *Lacy, Hartland & Co.*, the second mortgagees:—

We do not object to a sale, but we say that these costs ought not to be added to the Plaintiff's security, in other words, paid out of our own pockets. Admitting that the evidence proves the practice of auctioneers as alleged, we submit that the practice is not justifiable or reasonable where a vendor fills a representative or fiduciary character. In such a case the vendor, if he chooses to adopt that practice, must run the risk and bear the loss himself, should the sale prove abortive. Here the vendor ought to have required cash for the deposit or a reference before accepting the cheque of a stranger. The case is within the principle of *Allen* v. *Knight* (1); *Fisher* on Mortgages (2).

C. B. McLaren, for other *puisne* mortgagees, adopted the same line of argument, and also contended that the Plaintiff ought not to have verbally altered the amount of the deposit at the sale.

Fossett Lock, for the Defendant *Day*.

W. Barber, in reply.

[NORTH, J.:—I do not see how I can give you the costs of the Defendant *Elliott*. He was an unnecessary party from the outset.]

(1) 5 Hare, 272. (2) 4th Ed. par. 1564, p. 924.

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Barber:—We do not press for them.

NORTH, J.:—

The point in this case is shortly this, Mr. *Farrer*, the Plaintiff, is first mortgagee for £8000 of property which was apparently worth considerably more than the amount borrowed on the mortgages. His mortgage was made on the 1st of May, 1881, and up to November, 1882, he had only received one half-year's interest, and had not received any part of the principal money; and a sinking fund which was provided for by a deed of even date with the mortgage to be paid at the rate of £120 a year had not been commenced. Under those circumstances he put up the property for sale on the 2nd of November, 1882. On that occasion one of the conditions of sale provided that the purchaser should immediately after the sale pay a deposit of 10 per cent.

Now what took place was this, the property was put up for sale, and apparently the first bid was for £10,000. It went on by degrees until it reached the sum of £15,900, and at that sum the property was knocked down to Mr. *Peach*, and he gave his cheque for a deposit of £1000. That cheque was not paid when presented at his bankers in due course on the following day, partly because he had stopped it, and partly also because his balance at his bankers on that day was 9*s.* 4*d.* Then I should add this, that the contract which he signed after the sale was a contract in which he signs as "*Ward & Peach*, for *Charles Elliott*." The money is not paid, and thereupon *Elliott* is applied to, and he says, through his solicitor, first by letter and afterwards by his statement of defence, that he had nothing whatever to do with the sale. Then *Peach*, being a gentleman with the balance at his bankers which I have mentioned, is a man against whom no one suggests that civil proceedings of any sort should be taken. The result is, that the sale has been abortive, and it is said that in making an order now for sale I ought to give special directions to prevent the mortgagee getting, as part of his costs of the action, the costs of that abortive sale.

Now there are two reasons why it is said there was neglect and default on the part of the mortgagee of such a nature as to deprive him of, or disentitle him to, those costs. First of all, it is

said that the deposit having been fixed by the conditions at 10 per cent., it was improper to reduce it to less than 10 per cent. upon the purchase-money. Secondly, it was said that it was improper to receive a cheque for the deposit, but that the mortgagee ought to have received payment in cash, and that if cash had been received there would have been a fund in hand out of which the expenses of the abortive sale could have been paid.

With regard to the first point, the reduction of the deposit, the mortgagee selling under his power of sale had power to fix what sum he liked as being a reasonable deposit. He did fix 10 per cent., which no doubt is a large sum when the purchase-money is large. The deposit is intended to be a guarantee for the purchase being in good faith, and that the sale is intended to go on, and is likely to go on, and be concluded. If he had fixed a smaller sum, say 5 per cent., for property of this character, nobody could have said that the mortgagee had gone outside his power or acted improperly. Having fixed 10 per cent., the question is, why was it reduced? This is the reason which is given. It appears that a person named *Morley* who was holding himself out as likely to become a purchaser, and who did bid to a considerable extent at the sale, though he was not the actual purchaser, had suggested that there was a difficulty, in case he purchased, of finding a deposit of more than £1000, and *Day* suggested that the deposit should be reduced so as to enable *Morley* to compete at the sale with the other persons who were likely to buy. In other words, the object of reducing the deposit was that a person who could not otherwise have bought might be induced to bid, and possibly to buy the property. At any rate, the more bidders there were the more likely it was that the property would be sold, and it was for the parties to consider whether it would not be the more advantageous for all to secure an extra bidder for the property by reducing the deposit from whatever it might have turned out to be over £1000 down to £1000. That was carefully considered between the auctioneer and the managing clerk of the Plaintiff, who is a well-known solicitor. The clerk was a competent person to whom the principal entrusted the matter, and they consulted with reference to the reduction of the deposit-money. They consulted as to whether it might not

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be reduced from the sum which they had previously stipulated to the sum of £1000. That seems to me to have been perfectly reasonable and proper on their part. In doing that it does not seem to me there was any wilful negligence or default, or any negligence or default at all. Even if this were otherwise, the reduction of the deposit did not in any way affect the result.

The other point is this, that the auctioneer received instead of £1000 in cash a cheque for the amount from a person whom he did not know, and that cheque not being paid, the sale became abortive, and there was no fund to provide for the costs so incurred. With respect to the custom of auctioneers to accept a cheque for the deposit, there is the evidence of Mr. *Farrer*, himself an experienced solicitor with a large knowledge of these matters; and the evidence of the auctioneer who conducted the sale, and who spoke very positively as to this after a large experience, he being a member of a well-known firm; and there is the solicitor's clerk, and there was other evidence apparently forthcoming, only I, speaking for myself merely, said that I did not require further evidence on the point.

By that evidence it is shewn to be the universal practice, not of owners in fee only but of everybody selling houses or land, invariably to receive the deposit by means of a cheque. There are obvious reasons why it might be very inconvenient to adopt any other course. If every person who desired to bid at a sale knew that he had to draw out of the hands of his bankers a sum of such amount to take to the sale as would be required to pay the required deposit of 10 per cent., or whatever it might be, upon the purchase-money, it would to some extent affect his going to the sale, and would prevent persons intending to attend the sale being purchasers if they had not gone prepared for the purpose; and, as a matter of fact, it appeared from the evidence that no difficulty ordinarily arises. It has arisen now, but the question I have to consider is whether the mortgagee, who has on deliberation, after conferring with the auctioneer, adopted the universal practice, is to be deprived of his costs because he has done so. I can see no reason why I should come to any such conclusion.

Then it is further suggested that there is another piece of

carelessness on the part of the auctioneer and mortgagee in not getting references of some kind from the person who professed to be the purchaser's agent. It does not appear that any one knew he was purchasing as agent, and he did not bid as agent. All that is known is that, when the property has been knocked down to him, and when he is put into communication with the clerk, and the memorandum to be signed has been filled up for signature by the purchaser, he signs in a way which shews that he is not acting for himself, but is acting for somebody else. At that time it must have been too late to undo the matter and start afresh. That seems obvious, and the only question is whether the parties ought to have taken some steps to find out whether he was buying as agent or not in the first instance. In other words it comes to this that the sale is to be held in suspense until it is known whether the person who makes the bidding is acting for himself or acting for some one else, and his references have been asked for, examined, and approved. If that were the case, sales could not be practically carried out at all. It appears to me there was no negligence of any sort in not finding out that he was an agent, and no negligence in not requiring to see his references after it was discovered he was acting as agent.

On these grounds I see no reason why the Plaintiff should not have the costs of the abortive sale as part of the costs due under his securities.

With the concurrence of all parties I give judgment for an immediate sale, without waiting for taking the accounts; then there will be the ordinary account taken of what is due to the Plaintiff for principal, interest, and costs.

Barber, Q.C.:—We ask for an order for personal payment: *Dymond* v. *Croft* (1).

NORTH, J.:—You are entitled to the usual order as to that.

Dec. 21. A dispute having arisen as to the form of the order, the Defendant *Day* now moved to vary the minutes as drawn up by the Registrar.

(1) 3 Ch. D. 512.

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Fossett Lock, for the motion:—

The minutes direct immediate payment of principal and interest, but the Plaintiff is not entitled to that. By his statement of claim he asks for an account and for payment of what is found due, and the usual order is to direct payment six months after the date of the Chief Clerk's certificate: *Simmins* v. *Shirley* (1). We ask for the order to be drawn up as in that case.

Barber, Q.C., and *Lewin*, for the Plaintiff:—

We proved the amount due for principal and interest at the trial, and if this had been an action in the Queen's Bench Division we should have been entitled to judgment for immediate payment as a matter of course. We submit the same rule applies here. At any rate we are entitled to an order for payment within one month from the date of the certificate: *Lees* v. *Fisher* (before Vice-Chancellor *Hall*, 24th of January, 1880).

Fossett Lock, in reply.

NORTH, J. [after consulting the Registrar]:—

I think these minutes are wrong. There is no doubt, if the Plaintiff had brought this action in the Queen's Bench Division or the Chancery Division, it does not matter which, for the purpose of obtaining immediate judgment for the payment of this sum and interest, he would have been entitled to that judgment, and if the parties had any dispute about the interest it would have been ascertained at once by the officer of the Court. But that is not the course that was taken here. What the Plaintiff did was to commence an action in which he asked to have an account taken of what was due, "and that the Defendants may be decreed personally to pay to the Plaintiff what shall be found due to him on taking such account, together with the costs of the action." That was what was asked for, and I said the usual order must be made. The usual order, in my opinion, on an application of that kind is, not that the payment of the amount

(1) Seton, 4th Ed. p. 1036.

found to be due shall be postponed for six months after the date of the certificate, but that there shall then be an immediate payment, or a payment within such time, not being immediate, as the Court thinks right. The usual time given, I believe, in the Chancery Division is a month, and I certainly intended the order to follow the usual form; and what is more, that was the form in which the order was asked for, viz., that there should be judgment for what was certified to be due.

It seems to me, therefore, that in this case there ought to be judgment for the amount found to be due from the Defendant *Day*, and for payment of that amount within one month after the certificate. Then as regards the costs of this motion, both parties seem to me to be wrong, and though this Defendant is right in saying the order is wrong, what he proposed to have substituted would in my opinion, have been equally wrong. Therefore I shall give no costs of this application.

Solicitors for Plaintiff: *Duncan, Warren, & Gardner.*

Solicitors for Defendants: *Sydney Smith & Sons; Pyke & Minchin.*

H. L. F.

PEARSON, J.

1884

Jan. 17.

TAYLOR *v.* PONCIA.

[1868 T. 46.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 56, 63—*Absolute Trust for Sale—Order of the Court for Sale—Concurrence of Tenant for Life not required.*

A testator devised all his real and personal estate to trustees upon trust after the death of his wife absolutely to sell the whole of his property in such manner as they should think fit, and to pay one-fourteenth part of the proceeds to each of his fourteen children at twenty-one or marriage, with further provisions under which his daughters' shares were settled on them for life with remainders over.

A suit having been instituted for the administration of the estate, and the wife being dead, an order was made in the suit for sale of part of the estate by the trustees:—

Held, that the concurrence of the children constituting the tenant for life under the *Settled Land Act*, 1882, was not necessary upon the sale by the trustees; but even if such concurrence would be necessary the order of the Court was sufficient to enable the trustees to sell without joining the fourteen children or any of them in the conveyance to the purchaser.

THIS was a summons taken out under sect. 56, sub-sect. 3, of the *Settled Land Act*, on behalf of the Defendants *Henry Wareing* and *George Henry Branson*, who were the trustees of the will, that it might be declared whether or not the parties interested under the will of *Robert Fletcher*, the testator in this action, as tenant for life within the meaning of the *Settled Land Act*, 1882, were necessary parties to the conveyance or conveyances of parts of the testator's residuary real estate sold by the applicants under an order of the Court dated the 8th of May, 1883, in conformity with the trusts for sale reposed in them by the will of the deceased.

Robert Fletcher, by his will, dated in May, 1864, after giving a number of legacies of considerable amount, and after giving directions as to the disposal of portions of his personal property, devised and bequeathed all the rest and residue of his real and personal estate and effects of what nature or kind soever unto *John Poncia*, *William Taylor*, and his wife *Eliza Fletcher*, their heirs, executors, and administrators, upon trust to apply

the rents and profits during the life of his wife in payment of an annuity of £1500 to his wife, and to invest the surplus on the securities therein mentioned, and after the death of his said wife the testator declared that his trustees should stand possessed of his residuary real and personal estate and of the accumulations, upon trust as to his said freehold and leasehold estates with all convenient speed absolutely to sell the same, either together or in parcels, and either by public auction or private contract, and for such price and prices as to them or him should seem fit or reasonable, with liberty for them or him to buy in or resell the same at some future auction, and to convey and assure the same unto the purchaser or purchasers thereof as he or they should direct, and to receive the moneys arising from the sale or sales thereof and give effectual discharges for the same and exonerate the said purchaser or purchasers from all liability in respect to the application thereof. And as to the stocks, funds, and securities, and the accumulations thereof, upon trust to convert the same into money and to stand possessed of the proceeds of the sale of the said freehold and leasehold estates and of the stocks, funds, securities, and accumulations, upon trust to pay one-fourteenth part thereof to each of his fourteen children therein named, but the shares of his married daughters to be held upon certain trusts therein referred to under which they took estates for life only with remainders over. And the testator appointed his wife during her life and the said *J. Poncia* and *Henry Taylor*, their executors, administrators, and assigns, to be his executors.

The testator died on the 6th of September, 1867, leaving his wife and fourteen children surviving.

A suit was instituted in 1868 for the administration of the testator's estate, and to have the trusts of the will carried into effect, and in that suit an order was made on the 8th of May, 1883, for the sale by the trustees of a portion of the freehold settled estate which is now in question.

The testator's will contained no power to postpone the sale of his freehold and leasehold estates.

The testator's wife died in February, 1883. His daughters were still living.

PEARSON, J.

1884

TAYLOR v. PONCIA.

Higgins, Q.C., and *Ingle Joyce*, in support of the summons:—

The question is whether the trustees under a will with an absolute trust for sale, can make a good title to the property sold under their power, without the concurrence of the tenants for life. A similar question was raised before your Lordship in *In re Earle and Webster's Contract* (1), but the facts were different in this respect: that in *In re Earle and Webster's Contract* all the children of the testator among whom the property was to be divided after the death of the testator's widow were dead, and though in some cases there were grandchildren who were entitled to their parent's share, yet where there were no grandchildren, the children's shares had been dealt with and disposed of, consequently there were no persons entitled for life, since all the shares had become absolutely vested. If the consent of the tenants for life is held to be necessary the effect will be that the Act will supersede and annul the absolute trust for sale imposed by the testator. The object of the Act is expressed to be for facilitating sales, but in this case it certainly will have the contrary effect if all the tenants for life must concur in the sales; and it will necessitate the addition of fourteen parties to every conveyance which is executed. We submit that the 56th and 63rd sections of the *Settled Land Act* do not apply to a case like this. We also submit that the order made in this suit for the sale by trustees is one which overrides everything and there is no necessity for having the concurrence of the tenants for life.

Ingham, for the purchaser:—

The purchaser is a willing purchaser, and it does not matter to him which way the point is decided so long as he has the protection of a decision of the Court.

The property sold is clearly settled land within the meaning of sect. 63, sub-sect. 1, of the *Settled Land Act*, and the testator's daughters are tenants for life within the meaning of that sub-section; and the trustees (the vendors) are clearly trustees of the settlement within the meaning of the same sub-section.

That being so, the effect of sect. 63, sub-sect. 2, of the Act is to

(1) 24 Ch. D. 144.

make sect. 56 thereof apply to the settlement created by the will; and the question which the Court has to decide in the present case is whether or not the latter part of sub-sect. 2 of sect. 56, which enacts that the consent of the tenant for life shall by virtue of the Act be necessary to the exercise by the trustees of the settlement of any power conferred by the settlement exercisable for any purpose provided for in the Act, is to be read so as to apply to the exercise or execution by trustees of a trust for sale, such as that contained in the present will. If it is to be so read, the consent of the tenants for life is necessary, and they ought to join in the conveyance.

In support of the view that their consent is necessary, I submit that the whole spirit and scope of the Act, as deducible from all its provisions, is, so far as possible, to substitute the tenant for life for the trustees, and to make all those powers of sale and exchange, and leasing and other like powers which have hitherto been exercised by trustees, in future exercisable by tenants for life. And that it would be a narrow construction of sect. 56, sub-sect. 5, to confine it to powers strictly so called, and to exclude from its operation trusts for sale to which the Act for some purposes at any rate clearly applies. And I submit that under sect. 53 a tenant for life might if necessary be compelled to give his consent to a sale.

On the other hand, in support of the view that the consent of the tenants for life is not necessary, the trustees in the present case have no discretion vested in them; and it may be urged that sect. 58, sub-sect. 2, only applies to powers strictly so called, or to trusts in the nature of powers where the trustees have a discretion, and this would be in accordance with what your Lordship said in *In re Duke of Newcastle's Estates* (1).

On the second point, I submit that the present sale is a sale by the trustees in execution of their trust, and is not a sale by the Court, except in the sense that where there has been an administration decree trustees cannot sell without the leave of the Court; and that if the *Settled Land Act* makes the consent of the tenants for life necessary, the Court cannot override the Act

(1) 24 Ch. D. 129, 139.

PEARSON, J. and their consent is still necessary notwithstanding the order for sale.

1884

TAYLOR v. PONCIA.

PEARSON, J.:—

In this case there is an absolute trust for sale at a particular period, the death of the wife, which period has now arrived. The question is, the proceeds of the sale being directed to be invested and the income to be distributed among fourteen persons, which fourteen persons would make concurrently the tenant for life of the whole of the income, whether or not the consent of those fourteen persons is necessary to the performance of the trust which is vested in the trustees. Of course if that be so, I must come to this conclusion, that if anyone of those fourteen persons objects to the sale, the trustees cannot then do that which it is plainly their duty to do under the will and sell. Now I think if I were to come to any such conclusion as that, I should be putting an absurd construction upon the Act. I am quite satisfied that the Act was never intended to interfere with the performance of a positive and absolute trust vested in trustees, but I think that it was intended to prevent trustees from exercising by themselves a discretion when nothing but a discretion was vested in them, and to limit their exercise of a power given to them by saying that the power and the discretion cannot be put in force without the consent of the tenant for life; but where there is an absolute trust for sale, which trust for sale cannot be left unperformed without a breach of duty on the part of the trustees, it neither enables the tenant for life to control the execution of that trust, nor does it take away from the trustees the power of performing their duty as trustees. In addition to that, in this case there is an order of the Court directing that the property should be sold, and as at present advised, and subject of course to other circumstances existing in other cases which may make a difference between those cases and the present one, I am of opinion that even if the consent of the tenants for life could by any possibility be said to be necessary, the order of the Court would override that, and the purchaser would be perfectly safe in taking a conveyance from the trustees of the legal estate,

without the fourteen persons or any of them being made parties to such conveyance. I must, therefore, answer this question by saying that the concurrence of the fourteen persons who are said to be tenants for life here, or any of them, is not necessary; costs of all parties out of the estate.

Solicitors: *T. White & Sons; Sharpe, Parker & Co.*

T. W. G.

In re CHAYTOR'S SETTLED ESTATE ACT.

[1884 C. 225.]

Settled Land—Power of Tenant for Life to sell—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 51, 53, 56—*Previous Private Act authorizing Trustees to sell—Restriction on Exercise—Application of Purchase-money—Discharge of Incumbrances affecting part of Estate—Costs—Higher Scale—Rules of Supreme Court*, 1883, *Order* LXV., *rr.* 8, 9.

A settlement of land was made in 1853 by a private Act of Parliament. By this Act the estates were vested in the trustees thereby appointed, upon trust by sale or mortgage thereof to raise money for the purpose of discharging certain incumbrances and liabilities. The Act provided that the trustees might from time to time absolutely sell and dispose of all or any part of the estates mentioned in a schedule, provided that the trustees should not sell any of the lands situate in the parishes of *C.* and *H.*, unless it should be absolutely necessary for the purposes of the Act to do so, and in case of such necessity should not sell any of those lands until all the rest of the estates were sold.

After the *Settled Land Act*, 1882, had come into operation the tenant for life entered into a contract to sell some of the lands situate in the parishes of *C.* and *H.* The whole of the rest of the estates had not then been sold:—

Held, that the power of sale conferred on the tenant for life by the *Settled Land Act* was an absolute power over and above that given to the trustees by the private Act, and that he was therefore entitled to sell free from the restriction imposed by the private Act on the trustees.

Held, also, that, under sub-sect. 2 of sect. 21 of the *Settled Land Act*, the purchase-money could be applied in discharging a mortgage which affected part of the land sold and another mortgage which affected another part o the settled estate, and that it was not necessary that the other mortga should be one affecting the whole of the settled estates.

THIS was a summons under the *Settled Land Act*, 1882.

In 1853 a private Act of Parliament (16 & 17 Vict. c. 28),

PEARSON, J. 1884 *In re* CHAYTOR'S SETTLED ESTATE ACT.

called "*Chaytor's Estate Act*, 1853," was passed for raising by sale or mortgage of the real estates devised by the will of Sir *William Chaytor*, Bart., deceased, "moneys for payment of his debts and legacies, in aid of his personal estate, and for other purposes." By this Act certain real estates, specified in the 1st and 2nd Schedules thereto, were vested in trustees in fee, freed and discharged from the limitations created by the will of Sir *William Chaytor*, upon trust by sale or mortgage of the estates to raise money for the purpose of discharging certain charges and incumbrances, and the debts and legacies of the testator, and certain costs, charges, and expenses, and, subject to these trusts, the rents of the estates and the possession thereof were to be paid to or taken by the person or persons who would have been entitled thereto if the Act had not been passed. By the will of Sir *W. Chaytor* the estates had been devised in strict settlement. Sect. 11 of the Act provided that "the trustees from time to time may absolutely sell and dispose of all or any part of the estates respectively specified in the 1st and 2nd Schedules, and the inheritance in fee simple, or any estate, term, or interest in possession or expectancy of or in the same, with the rights, members, and appurtenances, unto any person whomsoever, whether interested under this Act or not, for the best price in money that can at the time of the sale be reasonably obtained for the same: provided always that the trustees shall not sell any of the lands in the several parishes of *Croft* and *Hurworth*, unless it shall be absolutely necessary for the purposes of this Act to sell the same, and in case of such necessity shall not sell any of those lands until all the rest of the estates are sold."

The 1st Schedule to the Act comprised properties known as the *Thoresby* estate, the *Coverdale* estate, and the *Hurworth* estate; the 2nd Schedule comprised properties known as the *Croft* estate, which were situate partly in the parish of *Croft*.

On the 14th of December, 1883, on the application of the tenant for life, an order was made by Mr. Justice *Pearson*, appointing the trustees of the settlement under the private Act to be trustees for the purposes of the *Settled Land Act*. The tenant for life afterwards entered into a contract for the sale of parts of the settled estates situate in the parishes of *Croft* and *Hurworth*.

The rest of the estates had not all been sold. The sale was approved of by the trustees, to whom notice had been given by the tenant for life under sect. 45 of the *Settled Land Act*. The purchaser declined to complete his purchase until the direction of the Court should have been obtained, on the ground that the sale was not authorized by sect. 11 of the private Act. A summons was taken out by the trustees for the purpose of obtaining the opinion, advice, and direction of the Judge, whether the trustees could properly, by the direction of the tenant for life, apply the purchase-money (which amounted to £27,000) (1) in payment of the costs, charges, and expenses of or incidental to the exercise of the powers, or the execution of the provisions of the *Settled Land Act*; (2) in discharging, to the extent of £17,000, a mortgage for £20,000 affecting the inheritance of the *Croft* estate; (3) in discharging, to the extent of £7000, a mortgage for £12,000 affecting the inheritance of the *Thoresby* estate; and (4) in making payments on proper certificates for improvements such as are authorized by the *Settled Land Act* on or in connection with the *Croft* estate and the *Thoresby* estate, or either of them, or on or in connection with the other parts of the lands subject to the settlement made by the private Act.

The summons was served on the tenant for life.

Sir *Arthur Watson*, for the trustees:—

The power of sale given by the *Settled Land Act* to the tenant for life is a much more extensive one than that which was given by the private Act to the trustees. The tenant for life could not have sold at all under the private Act; it was only the trustees who could do so; therefore the proviso in sect. 11 limiting the power of sale has no application to the tenant for life. The power given by the *Settled Land Act* is in addition to the power given by the private Act, and overrides it: *Settled Land Act*, 1882, ss. 51, 56; *In re Duke of Newcastle's Estates* (1). Moreover, the power of sale given by the private Act is only for the purpose of paying off incumbrances and other liabilities; the power given by the *Settled Land Act* may be exercised for any purpose.

(1) 24 Ch. D. 129.

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A. Carmichael Bruce, for the tenant for life.

PEARSON, J. :—

In my opinion the effect of the *Settled Land Act* is to give to the tenant for life a power to sell without reference to the discharge of incumbrances on the estate, a power over and above that which is conferred on the trustees by the private Act. The *Settled Land Act* gives the tenant for life an absolute power to convert the settled estate into money for any purpose whatever, even for mere caprice. I cannot, therefore, restrict him in selling. If the trustees were selling they could only sell subject to the provisions of the private Act, and they must follow the directions of that Act. But under the *Settled Land Act* the tenant for life is absolutely entitled to sell, subject only to the restriction contained in sect. 53 of that Act, which has not yet, I believe, received any judicial construction, that "a tenant for life shall, in exercising any powers under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position, and to have the duties and liabilities of a trustee for those parties."

I am of opinion that the tenant for life can make a good title to the purchaser.

Sir *Arthur Watson* :—The question then arises whether the purchase-money can be employed in the way proposed. It is suggested that, under sect. 21 (1), only incumbrances affecting the whole of the settled estate can be paid off.

PEARSON, J. :—I should read sub-sect. 2 of sect. 21 thus: "In

(1) Sect. 21 provides that "capital money arising under this Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the following modes (namely) *inter alia* :

"(II.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land."

discharge of incumbrances affecting the inheritance of the settled land which is sold, or any other land which is the subject of the settlement." I do not feel any doubt about that.

Sir *Arthur Watson* :—We ask that the costs of the application may be allowed on the higher scale, not on account of the value of the property, but on account of the difficulty of the question.

PEARSON, J. :—When the former application was before me in Chambers I directed that the costs should be allowed on the higher scale. I intended that direction to apply to all applications made to me in this matter.

Solicitors: *Shum, Crossman, & Co.*, agents for *Trotter, Bruce, & Trotter, Bishop Auckland.*

W. L. C.

C. J. B.
1883
Nov. 19.

In re WILLIAMS. *Ex parte* PEARCE.

Bill of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Instrument not in accordance with the Form in the Schedule to the Act.*

By a bill of sale executed two days before his bankruptcy *A.* (the grantor), in consideration of £30 paid to him by *B.*, and also in consideration of £10 charged by *B.* by way of bonus, assigned chattels to *B.* by way of mortgage for payment of £40. *A.* thereby agreed that he would "forthwith" pay to *B.* the £40, together with interest and costs then due thereon, and also pay the rent, rates, and taxes, and the premiums for insurance, and would "forthwith" after every payment produce and deliver to *B.* the receipts for the same. On default in payment of the sums thereby secured, "or if he should do or suffer anything whereby he should render himself liable to become a bankrupt, or remove, or suffer the chattels to be removed from the premises, or if execution should be or should have been levied against the goods of *A.*," or if he should make default in the performance of any of the covenants, or commit any breach thereof—it should be lawful for *B.* "forthwith or when and as soon as he should think fit" to enter and take possession, and after taking possession to relinquish and again take possession as often and whenever he should think fit. All expenses of entry and seizure (including a fee of 5 per cent. on the whole amount then due and secured by the bill of sale), and in the exercise by *B.* of any of the powers, rights, and remedies therein contained, were to be added thereto and to form part of the sum secured, as if such costs, charges, payments, damages, and expenses had originally constituted an integral part of the advance. It was also provided that further advances, not exceeding £100, might be made and added to the security; and it was finally provided (in the terms of the form in the schedule to the *Bills of Sale Act*, 1882), that the chattels thereby assigned should not be liable to seizure or to be taken possession of by *B.*, for any cause other than those expressed in sect. 7 of the Act.

Held, having regard to the provision for bonus in addition to the sum actually paid by the grantee, and especially to the power to seize in events other than those mentioned in sect. 7, that this bill of sale was void as being plainly in contravention of the provisions of the Act of 1882, and the form in the schedule thereto; and that the defects were not cured by the final proviso.

APPEAL from an order of the *Cardiff* County Court, setting aside a bill of sale given by *Thomas Williams*, the liquidating debtor, in favour of the Appellant, *F. H. Pearce.*

By the bill of sale dated the 27th of June, 1883, it was witnessed that in consideration of £30 paid by *Pearce* (the

mortgagee), and also in consideration of £10 charged by *Pearce* by way of bonus, *Williams* (the mortgagor) thereby assigned to *Pearce* all and singular the goods, chattels, and things then being in and about his (the mortgagor's) dwelling-house by way of mortgage for payment of £40, thereafter called "the principal sum," and the further sums thereafter provided to be paid by the mortgagee to the mortgagor, and interest thereon at the rate of 5 per cent. per annum. And the mortgagor thereby agreed that he "will forthwith pay to the mortgagee the principal sum aforesaid together with the interest and costs then due thereon, and also pay the rent, rates, taxes, or other impositions whatsoever payable in respect of the premises—and also the premiums for insurance and for keeping on foot the insurance of the said chattels, &c., from fire in the sum of £100, as and when the same should become payable, and will forthwith, after every payment, produce and deliver to the mortgagee the receipts for the same." If the mortgagee should at any time pay the premiums or any rent, rates, taxes, or other charges or incumbrances whatsoever, affecting or attaching to the said chattels (and he should be at liberty to do so if he thought fit), he should be entitled to add every such payment to the sum thereby secured, and be entitled to have the same remedies for the payment and recovery thereof as thereafter provided if such payment had constituted an integral part of the said advance. If the mortgagor should make default in payment of the sum or sums thereby secured or any part thereof at the time and in the manner theretofore appointed for payment thereof as aforesaid, or if he "shall do or suffer any matter or thing whereby he shall render himself liable to become a bankrupt," or suffer the said chattels, &c., to be distrained for rent, rates, or taxes, or "remove, or suffer the said chattels, &c., to be removed from the premises," or should not without reasonable excuse upon demand in writing by the mortgagee, produce to him his last receipt for rent, &c, "or if execution shall be or shall have been levied against the goods of the mortgagor under any judgment," or if he should make default in the performance of any of the covenants therein contained or commit any breach thereof—then, and in any of such case or cases it should be lawful for the

C. J. B. 1883 ~~ *In re* WILLIAMS. *Ex parte* PEARCE.

mortgagee "forthwith or when and as soon as the mortgagee shall think fit, without any previous notice or demand verbal or written, or otherwise, to enter" upon the premises in which the chattels should happen to be, and to seize and take possession of the whole or any part of the same, "and after taking possession to relinquish and again take possession thereof as often and whenever he shall think fit," or, if he should so think fit, to retain and keep possession of the said chattels, &c., and for that purpose put and continue a man in possession without the securities being thereby invalidated or rendered void or voidable, or, if the mortgagee should think fit, after the expiration of five days from taking possession and seizure, to sell the chattels upon the premises, or to remove and sell them and hold the proceeds "upon trust in the first place to reimburse himself the sum remaining due upon the security (including all payments, damages, costs, and charges herein agreed or declared to be included herein, or so much thereof as shall remain unpaid)"; and in the next place (or in the first place, if he should think fit), to pay all or any of the charges or incumbrances, whether rent, rates, or taxes, or any other amount whatsoever which should affect or attach to the said chattels, &c., or the premises in which the same should happen to be, and pay over the surplus if any to the mortgagor. And the mortgagor thereby covenanted and declared that all costs, charges, damages, payments, and expenses incurred, made, or sustained by the mortgagee in or about entering on the premises and seizing, retaining, and keeping possession of the said chattels, &c., or any part thereof (including fee on taking possession at 5 per cent. on the whole amount then due and secured by these presents), all travelling expenses and 5*s.* a day for each man in possession, expenses of carriage, removal, or warehousing, valuing, or sale of the chattels, "and in and about the exercise by the mortgagee of all or any of the powers, rights, and remedies therein contained, or in relation or incident thereto, and in and about the prosecution, defence, or maintaining at law or otherwise of the claim of the mortgagee to and mortgage of the said chattels, or in relation or incident thereto, the same shall be added thereto and form a part of the sum hereby intended to be secured," and until satisfaction thereof, together with

all costs, charges, payments, damages, and expenses as aforesaid, "the same shall be deemed to be a charge upon the said chattels, &c., and the mortgagee shall have the same powers, rights, and remedies in all respects for the repayment and recovery thereof as if such costs, charges, payments, damages, and expenses had originally constituted an integral part of the advance."

It was also agreed that the mortgagee might if he thought fit make any further advance or advances to the mortgagor on the security of the bill of sale not exceeding in the whole £100, which further advance or advances should be subject to all the provisions, conditions, and covenants therein contained, and, in case of any such further advance or advances being made, the same, and also the interest, costs, and expenses connected therewith, should be considered as an integral part of the before-mentioned advances, and the goods, chattels, and effects thereby expressed to be thereby assigned should be charged with payment thereof equally as the said advance, and the sum should not be redeemed or redeemable without payment of such further advance or advances, costs, interest, and expenses, "Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the mortgagee for any cause other than those expressed in sect. 7 of the *Bills of Sale Act*, 1878, *Amendment Act*, 1882."

A receipt by *Thomas Williams* for £30, "being the consideration for the foregoing bill of sale" was indorsed upon the bill of sale, and the bill of sale was registered on the 2nd of July, 1883.

At 2 P.M. on the 29th of June, 1883, two days after the execution of the bill of sale, the grantee took possession. Later on in the same day the grantor filed a liquidation petition. At a first meeting of creditors, held on the 16th of July, resolutions for a liquidation by arrangement were passed and registered, and *A. Lovett* was appointed trustee.

Upon the application of the trustee an order was made by the Judge of the *Cardiff* County Court on the 10th of August, 1883, setting aside the bill of sale, and declaring it to be void as against the liquidation trustee, and continuing and making absolute the injunction granted on the 21st of July, 1883, whereby *Pearce*

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(the grantee) was restrained from seizing, selling, removing, or otherwise dealing with the effects comprised in such bill of sale.

From this order *Pearce* now appealed.

A. T. Lawrence, in support of the appeal:—

This bill of sale, which has been impeached on a variety of grounds, is substantially in accordance with the form in the schedule to this Act. The consideration for which the bill of sale was given is truly stated, and the bonus was a matter of agreement between the parties. Both in sect. 9 and in the form given in the schedule, the words used are "by way of security for the payment of £ and interest thereon at ," not "for the repayment of the said sum," and the words "[or whatever else the consideration may be]" clearly contemplate that the consideration may be something beyond the actual money paid at the time of execution. In *Davis* v. *Burton* (1) the vice of the deed was that the amount of bonus was capitalised interest—an uncertain sum —"which may come to be enormously more if there is a violation of any of the covenants and a consequent seizure" (*per Cave*, J., (2)), whereas in this case there is nothing uncertain, the bonus being a fixed sum. Then it is objected that the covenant by the mortgagor for payment is "forthwith" and not on a certain day named. But the parties are at liberty to make their own bargain as to the time of repayment, and "forthwith" must mean within a reasonable time. Next as to the covenant to produce receipts for insurance "forthwith" and not on demand in writing, as in the case of rent, rates, and taxes; we say that this is an agreement necessary for maintaining the security, and in the case of insurance, which is so necessary for the preservation of the subject-matter, some more summary mode of requiring production of the insurance receipts is perfectly legitimate. It is also objected that the words "do or suffer any matter, &c., whereby he shall render himself liable to become a bankrupt" instead of "shall become a bankrupt"; "shall remove or suffer to be removed" instead of "shall fraudulently either remove or suffer to be removed"; "if execution shall be or shall have been levied" instead of "if execution shall have been levied," are all in excess

(1) 10 Q. B. D. 414; 11 Q. B. D. 537. (2) 10 Q. B. D. 417.

of the powers given by sect. 7. It is submitted, however, that these provisions are substantially in compliance and identical with sect. 7 (2), (3), (4), and (5); and that the other provisions as to relinquishing and again taking possession and payment of the expenses of taking possession are not contrary to the spirit of the Act and of the form in the schedule, but are conditions which the parties have agreed to "for the maintenance or defeazance of the security." But if the provisions as to seizing and taking possession of the property assigned should be considered inconsistent with sect. 7, the concluding proviso that the chattels shall not be liable to seizure, &c., for any cause other than those specified in sect. 7 of the Act gets rid of any such objection.

Winslow, Q.C., and *C. C. Scott*, for the trustee:—

This case is entirely within the decision in *Davis* v. *Burton* (1), and if the bill of sale in that case was void as an attempt to evade the Act, so *à fortiori* is this. The Legislature has said (*Bills of Sale Act*, 1882, s. 9) that bills of sale "shall be void unless made in accordance with the form in the schedule to this Act annexed," and the bill of sale differs from the form in several most material particulars. The sum charged for bonus was never lent, and therefore cannot form part of the consideration which, according to the form, must be the principal sum lent and rateable interest thereon. It is nothing but capitalised interest, which is an illegal provision: *Davis* v. *Burton*. The effect would be that every time the mortgagee enters he will get 5 per cent. interest on 5 per cent. interest, and bonus as well, together with all expenses that he may possibly incur. The covenant to repay forthwith does not satisfy the words of the form. Some reasonable time must be given for demand and compliance with the demand. Powers of seizing and taking possession are given under this bill of sale for causes clearly not included in those to which seizure is strictly limited by sect. 7 (2), (3), (4), and (5). The words of sect. 7 (2) are "if the grantor shall become a bankrupt," which is a very different thing from "if he shall do or suffer any matter or thing whereby he shall render himself liable to become

(3) 10 Q. B. D. 414; 11 Q. B. D. 537.

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a bankrupt." There must have been an adjudication in bankruptcy and not a mere act of bankruptcy.

In the provision as to removal the important word "fraudulently" used in sect. 7 (3) is omitted. The receipts for rent, rates, taxes, and insurance are to be produced "forthwith" and not "upon demand in writing by the grantee" as provided by sect. 7 (4). The words of sect. 7 (5) are "if execution shall have been levied," not, as in the bill of sale, "if execution shall be or shall have been levied." These are all provisions in direct contravention of the Act, and they are not cured by the final proviso. The provision for further advances also makes this bill of sale void, as there would be no indication to creditors searching the register of the position of the borrower, and the amount for which the security was given, "so that the twofold objects of the Act—that the borrower should understand the nature of the security which he was about to give for the debt due from him; and that a creditor upon merely searching the register should be able to understand the position of the borrower"—would be entirely defeated: *per Brett*, L.J., *Davis* v. *Burton* (1).

A. T. Lawrence, in reply.

BACON, V.C.:—

It has been found necessary to protect the public against the effect of bills of sale, and it has been enacted that they must be only in a certain form which is prescribed with great particularity in the schedule to the *Bills of Sale Act*. The Legislature has thought fit to protect borrowers in various ways, such as, for instance, by the *Pawnbrokers' Acts*, which have placed pawnbrokers under certain restrictions. Trade could not in certain instances be carried on without them. It is usual to have them in every community; but the restrictions upon them are plain and stringent. The Legislature has thought that borrowers ought to be protected against the effect of transactions by means of which the whole of a man's property is charged with the repayment of a sum of money, not, perhaps, at all proportionate to the value of the property charged. This Act of Parliament has

(1) 11 Q. B. D. 539.

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therefore to be construed with the utmost rigour. In this case a loan of £30 in money is made, and an agreement is made that the borrower shall pay £10 more for the accommodation which he receives. I do not know that that in itself is unlawful. It is certainly expressed in the bill of sale; but what I have to consider is, whether this bill of sale is fairly entered into, having regard to the provisions of the *Bills of Sale Act*. The matter was fully discussed in *Davis* v. *Burton*, which came at first before Mr. Justice *Cave* (1), and he decided the case not only on the ground that the provision for capitalised interest in that case rendered the bill of sale void, but that the whole scope of the bill was an attempt to evade the Act, and that if the objection as to the capitalised interest had not prevailed the bill of sale would have been void in other respects. He says (2), after stating the invalidity of the provision as to capitalised interest: "Again, the 7th section of the Act provides that the goods may be seized upon certain specified events and no others . . . . For these reasons I think the bill of sale is void." That in my opinion exactly covers the case. In the Court of Appeal the case was argued at much greater length, and in the result the judgment was affirmed. Now sect. 7 having provided that personal chattels assigned under a bill of sale shall not be liable to be seized and taken possession of except in certain cases therein enumerated, the bill of sale here provides for seizure in several events not contemplated by the statute; but it is said that whatever irregularity there may be is concluded and covered by the proviso at the end of the bill of sale, that the chattels shall not be liable to seizure for any cause other than those specified in sect. 7 of the Act. That does not, in my opinion, prevent the mischief at which the Act was aimed and which must arise if bills of sale such as this are to be held valid. The mortgagor is bound by those covenants. The grantee might seize in pursuance of one of those covenants, not in accordance with the Act, and then by relying on a saving proviso at the end he might succeed in shewing that the Act of Parliament had been complied with, and the grantor would thus lose the protection which the Act of Parliament intended to give him. That is not what the Legisla-

(1) 10 Q. B. D. 414. (2) 10 Q. B. D. 417.

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ture says. It says that the bill of sale shall shew upon its face all the rights of the borrower and the lender, and that the lender shall only enter in certain specified events. In *Davis* v. *Burton* the Master of the Rolls says (1) that "The Legislature intended that the loan of money upon the security of a bill of sale shall be a simple transaction; a bill of sale given by way of security for the payment of money shall be void against all the world, even as against the grantor, if it does not comply with the provisions of sect. 9. That enactment provides that a bill of sale shall be 'in accordance with the form in the schedule.' That must mean that every bill of sale must be substantially like the form in the schedule. Nothing substantial must be subtracted from it, and nothing actually inconsistent must be added to it . . . . There is, therefore, a blot upon the bill of sale before us; for upon breach of the covenants, it may be immediately after the execution of the bill of sale"—that applies directly to the bill of sale before me, because the word "forthwith" is used in it, and must mean that as soon as the money was paid the grantee had a right to enter and seize—"the sum secured may be altered into a larger sum by means of what is called 'capitalised interest;' in truth it is not interest at all, because the holder of the bill of sale may at any time repay himself the £300 and take the £180 besides. The effect of the provisions is that upon breach of any of the covenants he shall be paid those two amounts in full. This consideration is alone sufficient to uphold the judgment of the Queen's Bench Division. And I think the other blot pointed out by *Cave*, J., is fatal; it was intended by the parties to the bill of sale to allow the grantee to seize in a manner not permitted by the statute." Lord Justice *Lindley*, whose experience is at least equal to that of any other Judge in these matters, expresses his opinion to the same effect, and Lord Justice *Fry* agrees in that opinion. [His Lordship referred to the judgments of Lords Justices *Lindley* and *Fry*, and continued:—] Sect. 7 then is of the utmost importance in considering this case. It provides that personal chattels assigned under a bill of sale "shall not be liable to be seized or taken possession of by the grantee for any other than the following

(1) 11 Q. B. D. 539.

causes" (specified). The grantee might here the very day after the execution of the bill of sale, or even on the day itself on which it was executed, enter and seize, and that would entitle him to the charges for seizing and taking possession. Then he might relinquish possession and be entitled to claim not only interest at 5 per cent. upon all the money due, but also all the charges for his execution, and he might do that as often as he might think fit. What an abuse would thus be made of the provisions of a bill of sale like this! It would put it in the power of the grantee to threaten the grantor every day for causes for which he is not entitled by the Act to threaten, and enforce his threats by entry and seizure. For instance, he might do so for breach of any of the other stipulations. (1.) "If the grantor shall do or suffer anything whereby he shall render himself liable to become a bankrupt," instead of "shall become a bankrupt." (2.) If he "shall remove, or suffer the said chattels to be removed," instead of "shall fraudulently either remove or suffer . . . . to be removed." I only mention these as instances in which the provisions of sect. 7 have not been followed. In my opinion these provisions and the others which are not in accordance with sect. 7 are not covered or cured by the reference to sect. 7 in the proviso at the end of the bill of sale. The judgment of the Court below must be affirmed, and the appeal dismissed with costs.

Solicitors: *Smiles, Binyon, & Ollard,* agents for *Batchelor & Belcher, Cardiff; Bell, Brodrick, & Gray,* agents for *H. Cousins, Cardiff.*

F. G. A. W.

C. A.
1883
Dec. 8, 10, 11.

CARTER *v.* WHITE.

[1880 C. 115.]

Bill of Exchange—Acceptance in Blank—Right to fill up Drawer's Name after Death of Acceptor—Principal and Surety—Discharge of Surety—Laches of Creditor.

A bill of exchange accepted for valuable consideration, with the drawer's name left blank, may be completed by the drawer's name being added after the death of the acceptor.

A debtor gave his creditor a bill of exchange accepted by himself, but with the drawer's name left blank. The Plaintiff at the same time, as a surety, deposited with the creditor certificates of stock in a joint stock company as collateral security for the debt.

The debtor died without the creditor having filled in the name of the drawer, and his estate was insolvent.

The bill was never presented for payment, nor was notice given to the Plaintiff of its non-payment:—

Held, that the creditor had not discharged the Plaintiff from his suretyship by his omission to fill up the drawer's name and to give notice of the non-payment of the bill to the Plaintiff.

THIS was an appeal from a judgment of Mr. Justice *Kay* (1).

The Plaintiff was the trustee in bankruptcy of *George Noble*, who, on the 18th of November, 1874, deposited with the Defendant, Sir *T. White*, the certificates for £505 stock of the *Chigwell, Loughton, and Woodford Gas Company*, as collateral security for the payment of £500 due to Sir *T. White* from *J. E. Randle*, *Noble's* son-in-law. The debt was also secured by two incomplete bills of exchange, for £250 each, accepted by *J. E. Randle*.

One of the bills was dated the 15th of October, 1874, and payable two months after date; and the other, which was a renewal of a previous acceptance, was dated the 18th of November, 1874, and was payable three months after date.

Both these bills were made with the drawer's name in blank, and remained in this incomplete state in the possession of Sir *T. White* till the time of the commencement of the action.

They were never presented for payment, nor was the sum due on them ever paid. Sir *T. White* did not give *Noble* notice of their non-payment.

(1) 20 Ch. D. 225.

J. E. Randle died in January, 1875, having by his will appointed his wife his sole executrix.

Noble became bankrupt in 1879, and the Plaintiff was appointed trustee of his estate.

The present action was commenced on the 15th of March, 1880, and the Plaintiff claimed a declaration that the stock of the gas company ought to be treated as discharged from all claims of the Defendant, Sir *T. White*. The executrix of *J. E. Randle* was made a party by amendment.

The ground on which the Plaintiff's claim was rested was that the Defendant had, by his negligence, discharged *Noble* from his suretyship, especially by omitting to fill up the drawer's name to the bills, till it had become impossible to do so by reason of the death of the acceptor, whereby they had ceased to be valid securities.

In his answer to interrogatories the Defendant said, speaking of the original acceptances, "One of such acceptances would have been payable on the 18th of November, 1874, but was not presented, it being the arrangement between the said *J. E. Randle*, *E. Noble*, and myself, that it should not be presented, but be renewed by another acceptance, and that the said *G. Noble* should deposit with me the gas shares referred to in the pleadings, as security for the due payment of the £250, the amount of the renewed acceptance, and the £250, the amount of the other acceptance which was to be paid on the 18th of December, 1874." He then set out a copy of the renewed acceptance dated the 18th of November, 1874, and payable three months after date, and continued: "The £500, the subject of such renewed acceptance and of the acceptance which was to be paid on the 18th of December, 1874, was not paid, the non-payment of the said sum of £500 and the fact of the said acceptances not having been taken up, were the subject of constant conversation between myself and the said *G. Noble*, and as to the first of the said acceptances between myself and the said *J. E. Randle*, and as to the second of such acceptances between myself and *Kate Maria Randle*, his widow, and I constantly informed the said *G. Noble* that it was my wish that the £500 should be repaid."

Mr. Justice *Kay* held that the drawer's name might be filled

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in notwithstanding the death of the acceptor, and dismissed the claim except so far as it asked for an account of the debt and of the proceeds of the stock which had been sold by Sir *T. White*.

From this judgment the Plaintiff appealed.

Higgins, Q.C., and *Bradford*, for the Appellant:—

The Plaintiff has been discharged from his suretyship by the laches of the Defendant in not filling in the drawer's name. The acceptor is now dead, and it is too late to fill in the name and make the bills perfect. There is no case in which it has been held that a bill can be filled up after the death of the acceptor. And on principle it cannot be done, for when the acceptor delivers a blank acceptance to the intended drawer he gives him authority to fill it up; but if the acceptor dies that authority is at an end: *Watson* v. *King* (1); *Montague* v. *Perkins* (2); *Stoessiger* v. *South Eastern Railway Company* (3); *Byles* on Bills (4); *McCall* v. *Taylor* (5); *Goldsmid* v. *Hampton* (6). The only case against us is *In re Duffy* (7), which is not binding on this Court.

The contract of suretyship into which the Plaintiff entered was that the securities held by the creditor should be perfect bills, not mere inchoate instruments which were worthless. Therefore he has not got what he bargained for. It was the duty of the creditor to perfect the bills without delay and to present them, and if they were not paid to give notice of the dishonour to the Plaintiff. This he did not do, and now, even if the bills could be filled up, the remedy is barred by the *Statute of Limitations*: *Strange* v. *Fooks* (8); *Bonser* v. *Cox* (9); *Wulff* v. *Jay* (10); *Polak* v. *Everett* (11). If the Plaintiff is not entitled to recover the stock of the gas company from the Defendant he is entitled to prove against the estate of *Randle*, and our rights ought to be reserved in that respect.

(1) 4 Camp. 272.
(2) 22 L. J. (C.P.) 187.
(3) 3 E. & B. 549.
(4) 12th Ed. p. 88.
(5) 19 C. B. (N.S.) 301.
(6) 5 C. B. (N.S.) 94.
(7) 5 L. R. Ir. 92.
(8) 4 Giff. 408.
(9) 6 Beav. 110.
(10) Law Rep. 7 Q. B. 756.
(11) 1 Q. B. D. 669.

Rigby, Q.C., and *Shebbeare*, for the Defendant, were not called on.

COTTON, L.J.:—

This case has been brought by way of appeal from a decision of Mr. Justice *Kay*. The Plaintiff represents *Noble*, who became a surety to the Defendant *White* for a debt from *Randle*. *Randle* is dead. Mr. Justice *Kay* refused the relief prayed, but directed an inquiry what was due to *White*, and as to the proceeds of the stock. The objection of the Appellant to this judgment is that it is not declared, as the claim asks, that the Plaintiff's suretyship was discharged, he wishing to get back the stock which was transferred as security or the proceeds thereof. The facts are shortly these. In 1874, *White* lent a sum of money to *Randle*, and certain stock was deposited by *Noble* as security. Acceptances were given by *Randle* to *White* in blank, and remained in blank at *Randle's* death. The stock deposited as collateral security has now been transferred. The *Statute of Limitations* has run against the bills. Several grounds were urged by the Appellant. First, it was said that *Noble* agreed to become surety only for bills of exchange, and that meant perfect bills: whereas these are imperfect, and therefore his suretyship is discharged. But that argument is displaced when we look at the facts and the pleadings. In the statement of defence they are spoken of as "the acceptances in the statement of claim called bills of exchange." And when we come to the interrogatories it is clear that *Noble* knew at the time what the documents really were. [His Lordship read the passage from the interrogatories set forth above, and proceeded:—] The Plaintiff comes here without any evidence beyond that to shew what really took place; and from it we must come to the conclusion that *Noble* knew what the documents were—that they were not perfect bills of exchange, but acceptances only. That disposes of the first point.

Then we had this argument. It was said that the documents were not bills of exchange, and not promissory notes, and assuming that they could be filled up and made perfect before the death of the acceptor, yet that after his death no one had power to fill them up. That was the only point decided by Mr. Justice

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Kay, who held that they could be now filled up, and in my opinion it was correctly decided. The power which *White* had to fill up the acceptances was not in consequence of *White* being appointed by *Randle* his agent to fill them up on his behalf, but in consequence of a contract that the person to whom they were given, or anyone authorized by him, should be at liberty to fill them up. That contract was not put an end to by the death of the acceptor; therefore Mr. Justice *Kay* was quite right. Notwithstanding the death of the acceptor the power remains, and they may be still made good bills of exchange. It is said that if filled up in proper time they might have been presented and payment enforced. That question does not arise here. *Noble* never required that they should be filled up. The principle is this, that if there is a contract express or implied that the creditor shall acquire or preserve any right against the debtor, and the creditor deprives himself of the right which he has stipulated to acquire, or does anything to release any right which he has, that discharges the surety; but when there is no such contract, and he only has a right to perfect what he has in his hand, which he does not do, that does not release the surety unless he can shew that he has received some injury in consequence of the creditor's conduct. That is laid down by Mr. Justice *Blackburn* in *Polak* v. *Everett* (1). Here although these acceptances were not perfected, there is no evidence that anything could have been recovered from the debtor if they had been; therefore the surety is not entitled to anything in the nature of damages for being deprived of an advantage which he otherwise would have had. The surety is not now prevented from getting the acceptances filled up, though of course they would not be of any use if the statute were pleaded. A surety is not discharged merely by the negligence of the creditor. If he had required them to be enforced, and the creditor had refused, the surety might have been discharged, but he is not discharged merely by the laches of the creditor, for this reason, that the surety may at any time pay off the debt, and sue the debtor in the name of the creditor, or call on him to sue. Then it was contended that the bills were not presented and that no notice of dishonour was given to *Noble*,

(1) 1 Q. B. D. 675.

which it was said he was entitled to have. But the rule as to any notice of dishonour applies only to parties to bills of exchange, not to persons who are interested in them, without being parties. If any authority is required we have the case of *Hitchcock* v. *Humfrey* (1), referred to by Lord Justice *Lindley*, where it was expressly decided that the surety for payment of a bill is not discharged although he has received no notice of the dishonour of the bill. The same thing was laid down in *Black* v. *Ottoman Bank* (2). It was there said: "The cases referred to upon bills of exchange turn upon a different principle, viz., that by mercantile usage, a contract is implied by the holder to give notice of dishonour within a certain time to the drawer or indorser who stands in the situation of surety for the acceptor." I am therefore of opinion that the appeal must be dismissed, but there must be an account of what was due to *White*, and of the proceeds of the sale of the stock.

LINDLEY, L.J.:—

I am also of opinion that this appeal substantially fails. The substance of the demand is to be found in the first passage of the statement of claim. The question is whether the Plaintiff is right in that. On the evidence before us it is clear to me that *Noble* knew from the beginning of the transaction what the documents were, that the drawer's name was not filled in, and that they were not perfect bills. It is a strong thing to contend that the Defendant is to be deprived of his security because, as is contended, these acceptances are useless bits of paper.

The points relied on were, first, that the Defendant did not fill up and perfect the security. But he is in a position to hand over the acceptances in the same state in which he received them for better for worse, he is able to comply strictly with the rule that the creditor must hand over what he gets to the surety. It is said that it was his duty to present the bills for payment, and to give notice to the surety of their non-payment. That depends on the custom of merchants. It was decided years ago that there is a difference in this respect between those who are sureties for the payment of a bill, and those who are parties to the bill. In

(1) 5 Man. & G. 559. (2) 15 Moore's P. C. 472, 484.

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Byles on Bills (1) the author says: "A man merely guaranteeing the payment of a bill but not a party to it, is not discharged by the neglect of the holder to give him notice of dishonour, unless he has been actually prejudiced by such neglect."

It was next said that the Defendant had discharged his surety by holding the bills till the *Statute of Limitations* had run. Is it the law that a creditor who neglects to sue his debtor till the statute has run will thereby discharge his surety? There is no decision to that effect. On the contrary, the true principle is that mere omission to sue does not discharge the surety, because the surety can himself set the law in operation against the debtor. That disposes of most of the grounds of appeal.

As regards the judgment of Mr. Justice *Kay*, the point on which he decided it is new. There appears to be no authority on the subject except the Irish case *In re Duffy* (2). I am not disposed to differ from the Judge on that point. He has dismissed the action with costs except ordering an account against *White;* and I think he was right. The Appellant's counsel contends that he ought to have had judgment against the personal representative of *Randle*. This was not asked for in the Court below, but it is now contended that it would be right to give liberty to the Plaintiff to go in and prove against *Randle's* estate in an administration suit. He can go in and prove if he likes. I do not understand that the judgment precludes him from doing so, but I see no objection to insert a proviso in the judgment reserving him that power.

FRY, L.J.:—

I am of the same opinion. The question before Mr. Justice *Kay* was whether such a document as we have in this case can be filled up after the death of the acceptor; and it was argued that the delivery of the acceptance conferred an authority to fill it up, which came to an end with the death of the person who gave it, and therefore that it was too late now to make the acceptance a complete bill. In my judgment that reasoning proceeds upon a false proposition. It is not by an authority, but by a contract

(1) 12th Ed. p. 295. (2) 5 L. R. Ir. 92.

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between the acceptor and the intended drawer, that the drawer had a right to fill up the instrument and make it a complete bill. That is the nature of the transaction between them. You may call such a right an authority, but it is a right founded on a contract, and being a contract it does not come to an end by the death of the acceptor. The instrument may be made perfect after the death of the acceptor, as well as before. Therefore in my opinion the judgment was right.

The other grounds on which the Appellant rested his case were these: First, it was said that the surety was discharged because he did not get something which he bargained for. But the conclusion that I draw from the evidence is that he knew the facts from the beginning, and that he did get everything that he bargained for. Secondly, it was said that the non-presentment of the bills discharged the surety. In my opinion there is no ground for such a contention. On the other points I agree with the other Lords Justices, and I also agree that it will be better to insert the proviso that the judgment is not to preclude the Plaintiff from carrying in a claim against *Randle's* estate for what was paid out of his property in discharge of the obligation.

Solicitors: *Wild, Browne & Wild; A. T. Hewitt.*

M. W.

ARMOUR *v.* WALKER.

C. A. 1883 Dec. 12

[1882 A. 1629.]

Practice—Commission to examine Witnesses abroad—Rules of Supreme Court, 1883, Order XXXVII. r. 5.

If it is shewn that there are material witnesses resident abroad whom a party wishes to examine, a commission to examine them abroad will be granted if there is any reasonable ground for their not coming here, unless a case is made shewing that it is necessary for the purposes of justice that they should be examined in *England*.

THE Plaintiffs in this action carried on business in partnership at *New York* from a time prior to 1874. The case made by the statement of claim was that in April, 1882, the Plaintiffs entered

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into an agreement with the firm of *Walker Brothers & Engs* for a joint speculation in the purchase and sale of wheat, and that this adventure resulted in a loss of about £158,000, nearly the whole of which was paid by the Plaintiffs, who now sought contribution. That the firm of *Walker Brothers & Engs* purported to be established in December, 1880, as a limited partnership according to the law of *New York*, and was registered there as such, *Engs*, *G. F. Walker*, and *R. A. Walker* being the general partners, and *John Walker* and *R. F. Walker* being the special partners. That *R. F. Walker* had died on the 6th of March, 1882, but no notice of his death was given to the Plaintiffs till the 7th of June in that year, when a notice appeared in the *New York* papers stating that the partnership had been dissolved by the death of *R. F. Walker*, and that the old firm had been succeeded by a new limited partnership under the same name, consisting of *Engs* and *G. F. Walker* as general partners and *J. H. Walker* and *R. A. Walker* as special partners, which partnership was formed on the 7th of June, 1882. That this last partnership was not duly formed under the law of *New York*, and that the liability of the partners of the former firm continued as regarded the dealings with the Plaintiffs. That *John Walker* died on the 18th of September, 1882. The present action was brought against his executors and *R. A. Walker*, and sought payment by *John Walker's* executors out of his assets and by *R. A. Walker* of one moiety of the loss incurred in the adventure. The Defendants all resided in *England*.

The Defendants by their defence alleged that the firm of *Walker Brothers & Engs* was a limited partnership duly formed according to the laws of *New York;* that according to those laws the partnership was dissolved by the death of *R. F. Walker* on the 6th of March, 1882, and that his executors refused to assent to its being continued. That *Engs* and *G. F. Walker* had, in the interval between the 6th of March, 1882, and the 7th of June, 1882, continued to trade under the name of *Walker Brothers & Engs*, and had joined the Plaintiffs in the adventure for the purchase and sale of wheat. That the adventure was entered into without the privity of *John Walker* or *R. A. Walker*, and that neither of them had done anything to adopt or confirm the acts

of *Engs* and *G. F. Walker* about the adventure, and that they were subject to no liability in respect thereof.

Issue was joined on the 11th of June, 1883.

In July, 1883, the Plaintiffs took out a summons to have examiners appointed to examine witnesses in *New York*. In support of the application the Plaintiffs' solicitor deposed that the Plaintiffs were resident in *America*, and the transactions forming the basis of the claim occurred almost entirely in *America*, and that he was advised and believed that it was necessary for the Plaintiffs to examine in *America* several witnesses whose evidence was material for the trial, and who were resident there, and whom it would be impracticable to get to attend the trial in this country. That it would be necessary to take the evidence in *America* of one or more of the Plaintiffs and of Mr. *Miles*, their manager, who was resident in *America*, and also the evidence of several American barristers as to the American law of limited partnership: also of *G. F. Walker* and *Engs*, who were resident in *America*, and with whom the transactions out of which the claim arose were conducted.

The Defendants' solicitor deposed in opposition that it might become necessary that evidence should be given of American law, but that until the facts of the case were elicited and all the documents had been produced, it was impossible to say what points of American law it would be necessary to bring before the Judge at the trial. That if witnesses as to American law were examined in *America* it would be necessary for both leading and junior counsel and the solicitors for the parties to attend in *America*, and that the expense would be greater than if expert witnesses were examined here. That American lawyers of eminence were frequently visiting *England*, and that it would not be difficult to obtain the attendance here of American lawyers capable of giving the requisite evidence, and that the expense would be much less than if they were examined in *America*.

On the 19th of July Mr. Justice *Chitty*, in Chambers, made an order appointing certain persons resident at *New York* examiners to take the evidence of witnesses residing at *New York* or elsewhere in the *United States of America*, and particularly of the Plaintiffs and of *Miles*, the Plaintiffs' manager, and of

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G. F. Walker and *Engs*, and of two American barristers therein named.

The Defendants appealed from this order, and the appeal was heard on the 12th of December, 1883.

Macnaghten, Q.C., and *Fellowes*, for the Appellants :—

The order is only to be made where it is necessary for the purposes of justice : Order of 1883, XXXVII., rule 5. Here no case is made for the examination of the Plaintiffs but that they are in *America*. That is no sufficient reason, and they ought to come here : *Berdan* v. *Greenwood* (1).

[COTTON, L.J. :—In that case we thought he was keeping out of the way.]

The order ought to name the witnesses.

[COTTON, L.J. :—That point is disposed of by *Nadin* v. *Bassett* (2).]

The affidavits shew that a satisfactory examination of American lawyers can be had here, so there is no need for a commission.

A. R. Kirby, contrà :—

There is enough to satisfy the Court here that the case is one which the Court ought to try, and that the evidence to be obtained is material. The Court, therefore, will order a commission, there being nothing to throw doubt on the *bona fides* of the application, and no special reason being shewn why the witnesses should be examined here : *Crofton* v. *Crofton* (3). There is no absolute rule that Plaintiffs must come to *England* to be examined : *Banque Franco-Egyptienne* v. *Lütscher* (4). The best evidence of American lawyers cannot be obtained here. There must, then, be a commission, and there is no reason why the Plaintiffs should not be examined under it, the case not being one where any special reason is shewn for their being cross-examined in this country.

Macnaghten, in reply.

(1) 20 Ch. D. 764, n.
(2) *Ante*, p. 21.
(3) 20 Ch. D. 760.
(4) 28 W. R. 133.

COTTON, L.J.:—

In my opinion an order for a commission to examine witnesses abroad ought not to be made unless some reason is shewn why they cannot be examined here, nor unless the Court is also satisfied that there are material witnesses abroad whom the party wishes to examine. It should not be a mere roving commission to give the party a chance of finding evidence abroad. I think that in the present case it is shewn that there are material witnesses, who cannot reasonably be expected to come here unless there is some special reason why their examination should take place in this country. As regards the Plaintiffs, I think this is not a case where the purposes of justice require that they should be here. This is not a case of identity like *Nadin* v. *Bassett* (1), and I rather doubt whether the action turns much on any dispute as to facts. As to the American lawyers, it is urged, and, as it seems to me, correctly, that none whose opinion is worth having would come over here; and I think that a sufficient reason for directing a commission to examine American lawyers in *America*. I think that the order is in substance right, but it should be qualified by directing that the commission is to be executed in *New York*, and that if the Plaintiffs wish to examine any persons other than those named in the order, they must give ten days' notice of their names and addresses to the opposite side.

LINDLEY, L.J.:—

I think that all that is required to justify the issuing the commission is that it should be shewn that there are witnesses resident in *America* whose evidence is material, unless a case is made out why they should be examined here. There may be special cases where it is necessary for the purposes of justice that the examination should take place here, but no such special case is made out on the present occasion.

FRY, L.J.:—

I am of the same opinion.

Solicitors: *George Davis, Son, & Co.; Stibbard, Gibson, & Co.*

H. C. J.

(1) *Ante*, p. 21.

Applied. DUDLEY, ETC. *v.* EMERSON. [1949] Ch. 707

Dictum of the EARL OF SELBORNE, L.C., at p. 681, *applied.* DUDLEY & DISTRICT BENEFIT BLDG. SOC. *v.* EMERSON. [1949] 2 All E.R. 252.

C. A.

1884

Jan. 16.

CORBETT *v.* PLOWDEN.

[1882 C. 395.]

Mortgagor and Mortgagee—Lease subsequent to Mortgage—Notice by Mortgagee to Tenant to pay Rent to him.

C., the owner of a leasehold estate which was subject to a mortgage, entered without the privity of the mortgagees into an agreement with *P.* to grant him a lease for twenty-one years, and in 1875 *P.* took possession under this agreement. On the 25th of March, 1881, the mortgagees' solicitors wrote to *P.* stating that they, on behalf of the mortgagees, had withdrawn *C.'s* authority to receive the rents and asking him to pay the rent due that day and all future rent to them. *P.* wrote to ask *C.* whether he ought to pay according to the notice, and *C.* replied that he would be correct in doing so. *P.* consulted his solicitors, who inspected the mortgage deed, and advised him that the mortgagees could claim rent from him. *P.* therefore paid the mortgagees the rent due on the 25th of March, and on the 22nd of June gave them notice to determine his tenancy at Christmas. At the end of the year the mortgagees refused to accept possession, and in June, 1882, they and *C.* commenced this action to compel *P.* to take a lease according to the agreement:—

Held, affirming the decision of *Pollock*, B., that the notice by the mortgagees to the tenant to pay rent to them and the payment accordingly did away with the agreement between *C.* and *P.* and made *P.* tenant from year to year to the mortgagees, and that specific performance of the agreement could not be decreed.

IN 1875, *W. Corbett*, one of the Plaintiffs, was entitled to a messuage for a long term of years, subject to a mortgage by demise dated the 11th of March, 1869, which was vested in *C. N. Cole.*

On the 25th of August, 1875, *Corbett* agreed with the Defendant to grant to him a lease in which all proper parties would join, for a term of twenty-one years, from the 29th of September, 1875, determinable by the lessee at the end of the seventh or fourteenth year by six months' notice. The Defendant shortly afterwards took possession. It was not alleged that the mortgagee was privy to this agreement.

On the 25th of March, 1881, the solicitors of the other Plaintiffs, *Mostyn* and *Eykyn*, to whom *Cole's* mortgage had in 1879 been transferred, wrote to the Defendant, "We beg to give you

notice that we have, on behalf of the first mortgagees of this lease, withdrawn Mr. *Corbett's* authority to receive the rent, and we have to request that you will be good enough to pay the rent due this day and all future rent to us."

On the 30th of March, 1881, *Corbett*, in reply to a letter from the Defendant, wrote, "For some time past I have received your rent on behalf of Mr. *R. S. Taylor*, the second mortgagee. His firm have now arranged to collect these rents themselves. You will be quite correct therefore in paying your rent to them in accordance with their notice, as they act not only for the second but also for the first mortgagees."

On the 28th of April the Defendant wrote to the Plaintiffs' solicitors saying that he knew nothing of the mortgagees. The solicitors replied that the house was mortgaged to *Mostyn* and *Eykyn*, and that "they have entered into possession of the property and are legally entitled to demand your rent of you, and to give you a proper receipt. We shall be pleased to produce the mortgage to you at any time it is convenient to you to call." After some further correspondence, in the course of which the mortgagees' solicitors wrote, "The mortgagees having entered into possession of the property you are liable to them and not to the mortgagor," the Defendant took legal advice, and being advised that the mortgagees were entitled to claim rent, he paid them the rent for the quarter ending Lady Day, 1881, after his solicitor had inspected the mortgage deed. On the 22nd of June, 1881, the Defendant gave notice to the mortgagees' solicitors to determine his tenancy on the 25th of December then next. The solicitors declined to accept it, saying that by the agreement the tenancy could not be determined till Michaelmas, 1882.

At the end of 1881 the Defendant tendered to the mortgagees' solicitors the key of the house, which they declined to receive, insisting that his tenancy was not determined, and in January, 1882, *Corbett*, *Mostyn*, and *Eykyn* commenced this action to compel the Defendant to accept a lease pursuant to the agreement of the 25th of August, 1875. On the 16th of January, 1883, Mr. Baron *Pollock*, sitting for Mr. Justice *Pearson*, dismissed the action. The Plaintiffs appealed.

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W. W. Karslake, Q.C., and *Jason Smith*, for the Appellants:—

Mr. Baron *Pollock* thought that he could only look at the letter of the 25th of March, 1881, and could not take any notice of *Corbett's* letter of the 30th of March. He therefore came to the conclusion that there was an eviction of the tenant and a renewed tenancy on terms wholly irrespective of the previous one. But the letter of the 25th of March asks for "the rent," treating the tenancy as subsisting—it contains nothing like a determination of the old tenancy and the creation of a new one. The inference from the correspondence is that under an arrangement between the mortgagees and the mortgagor his possession was to remain undisturbed, but the rent was to be received by the mortgagees. The mortgagees never indicated any intention to make the tenant a yearly tenant to them—he is relying on a technicality against the intention of all parties. A mortgagee may entitle himself to rents which accrue under a tenancy created by the mortgagor after the mortgage: *Pope* v. *Biggs* (1). Suppose the Defendant tenant from year to year to the mortgagees why should not specific performance be decreed, such a tenancy is no more an objection than a tenancy to *Corbett* would have been.

[FRY, L.J.:—Do you say that if the mortgagees had evicted *Plowden* a suit for specific performance could afterwards have been maintained against him?]

We cannot say that.

[FRY, L.J.:—Then does it not come to this—whether there was not a new arrangement which was tantamount to eviction and a new tenancy?]

Before the notice of the mortgagees there was an agreement of which specific performance could have been decreed, the rule no longer holding that a tenant under an agreement is at law only a tenant from year to year: *Walsh* v. *Lonsdale* (2). In *Keech* v. *Hall* (3) Lord *Mansfield* treats the mortgage as raising a mere question of conveyance, as in the case of a purchase of freeholds.

(1) 9 B. & C. 245.
(2) 21 Ch. D. 9.
(3) Dougl. 21; 1 Sm. L. C. 8th Ed. p. 574.

Higgins, Q.C., *Gainsford Bruce*, Q.C., and *Nalder*, *contrà*, were not called upon.

EARL OF SELBORNE, L.C.:—

I am very sorry that in such a case as this the law should be, that no privity can be presumed between the mortgagor and the mortgagee as to leases subsequent to the mortgage, but so the law is. Evidence might have been given, if the facts were so, that the mortgagees were in substance parties to the agreement for the lease, that they authorized it, and that it was made by the mortgagor for them as well as for himself. If that had been the fact it could have been proved, but no attempt has been made to prove it. If the writ in this action had been issued before anything had happened to alter the position of the parties, Mr. *Plowden* being in possession as tenant under the mortgagor and the mortgagees having done nothing to disturb that possession or alter its character, I have no doubt that such a decree as is asked for might have been made; for the mortgagees would have adopted the mortgagor's agreement while it was still competent for them to do so. But the paramount right of the mortgagees being asserted, the tenant has availed himself of the right which in that case the law gives him to consider himself as holding no longer from the mortgagor, but as a tenant from year to year of the mortgagees, and he has taken the necessary steps to determine his tenancy. It is therefore too late for the mortgagees to adopt the agreement between the mortgagor and the tenant and bring an action to enforce it against the tenant. The only question is, whether the tenancy was well determined by Mr. *Plowden*, and that depends upon well understood principles of law. If a mortgagor left in possession grants a lease without the concurrence of the mortgagees (and for this purpose it makes no difference whether it is an equitable lease by an agreement under which possession is taken, or a legal lease by actual demise) the lessee has a precarious title, inasmuch as, although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagees may be asserted against both of them. The question is, whether in this case it was asserted. It was argued for the Appellants that,

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from the correspondence, it was to be inferred that the mortgagees did not intervene by their paramount title, but claimed the rent due to the mortgagor on the footing of leaving the mortgagor's possession undisturbed, under an arrangement as between him and themselves. In the first place, I cannot draw that inference from the letter of the 25th of March, 1881. The words are, "We beg to give you notice that we have on behalf of the first mortgagees of this house withdrawn Mr. *Corbett's* authority to receive the rent, and we have to request that you will be good enough to pay the rent due this day and all future rent to us." I agree, that it may be inferred from the terms of that letter that they knew that the tenant was *de facto* holding on the terms of paying a rent which accrued due on the usual quarterly days; but nothing appears to me to follow from that, because it is well settled law that when a mortgagee intervenes by virtue of his paramount title, and claims rent, which he has a right to do without setting up any lease whatever, the rent if paid will be the previously existing rent, under a new tenancy from year to year under the mortgagees. I conceive that it can make no difference in point of law, or as to the consequences of the act done, that the mortgagees know what the rent payable by the tenant to the mortgagor is, and at what time it will be payable. Therefore, from those words I can draw no further inference. The statement that they have withdrawn *Corbett's* authority to receive the rent is exceedingly like the ordinary case of setting up their own paramount title as first mortgagees; and though I do not suppose the letter was written with a view of meeting Lord *Mansfield's* words in *Keech* v. *Hall* (1), yet there is a remarkable coincidence with some words which he there used. The point being there raised as to the possibility of the mortgagee carrying his claim back beyond the date of his notice, and recovering mesne profits, Lord *Mansfield* says, "I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest by an implied authority from the mortgagee till he determine his will." If those words had been before the writer of this letter, they might

(1) Dougl. 23.

have suggested the very expression used, that the mortgagees withdrew Mr. *Corbett's* authority to receive the rents. I do not deny that if there had been evidence shewing a state of facts favourable to the Plaintiffs' argument, these words might have received explanation from that evidence; but, so far from there being any such evidence, the sequel of the correspondence is this: Mr. *Corbett* writes to Mr. *Plowden*, saying that Mr. *Plowden* will be quite correct in paying the rent as demanded, since the solicitors who make the demand are acting for the mortgagees. He says no more than that; but the tenant, Mr. *Plowden*, from first to last treats the notice as an assertion of a paramount right by the mortgagees. He says, I cannot recognise you; I will not recognise you; he called on them to produce and prove their title, and when they had done so he, being advised that they were entitled to claim rent, paid them. It is plain that they insisted on their paramount title, and the effect of the payment to them under those circumstances is, according to all the authorities, to create the relation of tenancy from year to year on his part towards them. This tenancy he took the proper steps to determine, and it had actually been determined before this suit was instituted. I think, therefore, that the judgment is right, and must be affirmed.

COTTON, L.J.:—

I am of the same opinion. If this were an action for specific performance of an agreement made on behalf of the mortgagees as well as the mortgagor, the parties being always ready to grant a lease and it was shewn that the facts were so, the case would stand very differently, but that point was not raised. It was asserted by the Plaintiffs that the Plaintiff *Corbett* was always ready and willing to grant a lease with the concurrence of all necessary parties. That is denied by the Defendant and there is no evidence of it.

The only other point in the case is this, that what was done on behalf of the mortgagees was not asserting their title, but asserting the title of the Plaintiff, *Corbett*, under the agreement, and asking that the rent should be paid to them as his agents, and

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on his behalf. That is inconsistent with the letters. If we look to the letters written before the rent was paid there is an assertion by the mortgagees that they have entered into possession, and have a right to the rent, and the inquiries made by Mr. *Plowden* are; are you really mortgagees? I know nothing of anybody except Mr. *Corbett*, he is the only person with whom I have any agreement; and almost the last letter written by the solicitors of the mortgagees shews as clearly as possible that the intention at the time when the rent was received was not to receive it as under the agreement and on behalf of the mortgagor. They say "We are in receipt of your letter of the 30th ult. The mortgagees having entered into possession of the property; you are liable to them, and not to the mortgagor." After that how can they assert that when they did what they did in this case they were not asserting their own independent title, but were merely asking for payment of the rent under and according to the agreement entered into by Mr. *Corbett*.

FRY, L.J.:—

To my mind this is a very plain case.

The first question which arises is whether Mr. *Plowden*, the Defendant, validly determined the agreement. That raises this further question, whether Mr. *Plowden* occupied at that time the position of tenant from year to year to the mortgagees, or of tenant under the agreement. That turns upon this further question, whether the mortgagees by their notice of the 25th of March, and by the correspondence, asserted their independent superior title as mortgagees, or whether they claimed to receive the rents as agents of the mortgagor. To my mind the correspondence plainly shews that they asserted their superior title, and did not claim as agents of the mortgagor. The answer to those questions in my mind determines the whole case.

When these conclusions have been arrived at, it is impossible to suppose that specific performance can be obtained; because for a considerable period of time the mortgagees have asserted a title against the party who agreed to grant the lease, and they cannot by subsequently attempting to set up his title after the

tenancy has been determined, obtain the benefit of that agreement.

The appeal must, therefore, be dismissed with costs.

Solicitors for Plaintiffs: *R. S. Taylor, Son, & Humbert.*

Solicitors for Defendant: *Collyer-Bristow & Co.*

H. C. J.

In re BODDINGTON.
BODDINGTON *v.* CLAIRAT.

[1882 B. 3587.]

Will—Construction—Annuity to Wife "so long as she shall continue my widow and unmarried"—Voidable Marriage—Substitutionary Gift.

A testator, after giving a legacy of £200 to his wife, directed his trustees "in addition thereto to pay to my said wife, so long as she shall continue my widow and unmarried, an annuity of £300, or otherwise in lieu and in substitution of the said annuity, at the option of my said wife if she shall prefer it, a legacy of £2000." After the date of the will the marriage was declared null by the Divorce Court in a suit brought by the wife against the testator. After this the testator died leaving the lady surviving. *Fry*, J., held that she was entitled to the legacy of £200, but was not entitled either to the annuity or the £2000. She appealed from this decision so far as it was unfavourable to her:—

Held, that although if the lady had been the testator's wife at his decease the words "shall continue my widow and unmarried," might have been in substance the same as "shall continue unmarried," the reference to widowhood could not on that ground be treated as surplusage, but was the principal part of the condition, and that as the lady did not at the testator's death fill the position of the testator's widow, she could not take the annuity.

Held, further, that she could not take the £2000, for that an option to take a legacy instead of an annuity could not exist if there was no right to take the annuity; and, moreover, that a gift by way of substitution for another is subject to the same conditions as the original gift.

Rishton v. *Cobb* (1) doubted.

THIS was an appeal by the Plaintiff from a decision of Mr. Justice *Fry* (2).

(1) 5 My. & Cr. 145.

(2) 22 Ch. D. 597.

C. A. 1884

In re BODDINGTON. BODDINGTON *v.* CLAIRAT.

Sir *H. James*, A.G., *Cozens-Hardy*, Q.C., and *Finch*, for the Appellant:—

It has been decided that the legacy given to the lady *quâ* the testator's wife is not defeated by her not being his wife at his death. Why, then, should the annuity given to her by the same description be defeated because it is to last only during widowhood? The object of the gift is to provide her with maintenance unless and until she marries some one else who will be liable to support her. "So long as she remains my widow" is the same thing in substance as "so long as she remains unmarried after my death." If the latter expression had been used alone, there could have been no question she must have taken the annuity, and the former is superfluous and adds nothing. There is no more misdescription in calling her his widow than in calling her his wife, and if the latter misdescription does not destroy the gift neither can the former. It appears from *Kennell* v. *Abbott* (1) that fraudulent assumption by a legatee of the character in which a legacy is given will avoid the legacy, but not a mere misdescription, where there is no doubt as to the person. *Rishton* v. *Cobb* (2) governs the present case.

[EARL OF SELBORNE, L.C.:—With all deference to Lord *Cottenham*, I should have some difficulty in following that case. It seems rather startling that a woman to whom an annuity is given so long as she remains unmarried, can take it if, unknown to the testator, she was married at the time; nor can I understand how the annuity was held to be a perpetual annuity not conditional on her being single.]

Suppose the testator had given "to my wife" £2000, with an option to take an annuity instead of it, she surely could have taken the legacy. It would stand on the same footing as the £200 legacy. Reversing the order cannot make any difference, so if she cannot take the annuity she can still take the £2000.

[EARL OF SELBORNE, L.C.:—Can a substitutionary gift be taken free from the conditions annexed to the original gift?]

The condition of continuing the testator's widow was not

(1) 4 Ves. 802. (2) 5 My. & Cr. 145.

meant to describe two events; had she been his lawful wife there would only have been one event, so one event is all that is contemplated—the remaining single. Again, an annuity is merely a succession of legacies, to each of which the same considerations apply as to the £200.

[EARL OF SELBORNE, L.C., referred to *Roper* on Legacies (1) as to a substituted legacy being subject to the same conditions as the original legacy.]

That relates to cases of a legacy given by will and a substituted legacy given by codicil, not to cases of an option given to the legatee by the will. The legatee was to take the £2000 free from any condition as to not marrying again, so the object was in giving this legacy to dispense *pro tanto* with the conditions attached to the annuity.

Davey, Q.C., and *Langworthy*, for the Respondents, were not called upon.

EARL OF SELBORNE, L.C.:—

We think that the decision of the Court below is right. This is certainly not a case in which we are embarrassed by any conflict between what we are compelled to hold and what is reasonable and just; because, if I were asked whether it is at all probable that, in the circumstances of this case, the lady was intended to take the bequest under the will, I should say that it is not at all probable. That however does not determine the law of the case.

But on the point of law I think that the construction of this will, supposing there had been no authority on the subject, is reasonably plain. The words are these: "And in addition thereto to pay to my said wife, so long as she shall continue my widow and unmarried, an annuity of £300 by equal quarterly payments, commencing from the date of my decease." These words appear to express, as plainly as language can, that the *status* of widowhood is a condition of the inception and a measure of the duration of the gift. For my own part I have no difficulty in saying that these words make it clear that she cannot take the annuity

(1) 4th Ed., p. 873.

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at all unless she is the testator's widow, and that if at any time she ceases to be his widow she ceases to be entitled to it. It was ingeniously contended that if the word "unmarried" had been alone used, it would, if the lady had been the testator's wife at his decease, have come to the same thing as the words which the testator has used. Perhaps that may be so, but one must remember that the moral obligation to make provision for a widow depends upon the fact that she is the testator's widow. Therefore the word "widow" must be regarded as the principal word here, and the word "unmarried" must be regarded as only added *ex cautelâ*, as I should think, to shew that though in some cases and for some purposes rights acquired by a widow as such might continue after her second marriage, it was not intended to be so here. My impression is that the words "and unmarried" are not, in such a case, necessary. Without turning the word "and" into "or," which is not to be done without reasonable grounds discoverable in the context of the instrument, you cannot get rid of the condition of widowhood which in this case was certainly never fulfilled. It is argued that because what he gives to her under the description of "wife" is good although she was not his wife, and was afterwards declared not to be so, what is given to her under the description of widow must, therefore, be taken in a non-natural sense, that is to say, in the sense of her being a *quasi*-widow, a person who, if the marriage had been lawful, would have been his widow. But I think that argument loses sight of the ground on which the gift to her described as his wife of the £200 remains in force. It is not that the word "wife" is taken in a non-natural sense, but it is that, looking to the facts, it does not appear that the word "wife" is such a part of the description as to amount to a condition that she should not take unless she filled the character of wife. *De facto* she was his wife when the will was made, so there is no ground for imagining that he intended to do more than describe her as at that time she would be naturally and commonly described. But the annuity is given in terms which express a condition that she should continue his widow, and that the annuity should be paid only so long as she continued such, and we cannot depart from those words.

With regard to the case of *Rishton* v. *Cobb* (1), the respect I feel for the great Judge who decided it prevents my saying more of the judgment than that I do not understand it, and that if it were applicable to this case I should hesitate for some time before I could follow it. I think, however, that it is not applicable. In saying so I do not rely on what seems to me a somewhat refined distinction between the gift of the income of a fund and the gift of an annuity, but I refer to what Lord *Cottenham* himself says, regarding, as he did, the annuity in that case as perpetual, and not for life only (2): "This is different from a gift of dividends during widowhood. The state of widowhood must determine with the life of the widow." It is quite plain that it is not to be inferred from his judgment that he would have decided the present case otherwise than Lord Justice *Fry* has decided it. *Rishton* v. *Cobb*, therefore, does not bear on the present case, and if it did it would take some time to convince me that it ought to be followed.

I now come to the other point. The words are "or otherwise, in lieu and in substitution of the said annuity at the option of my said wife if she shall prefer it, a legacy of £2000." Is that or is it not a gift to be taken only if the state of things exists under which she would have been entitled to the annuity? I think, without reference to any general rule of law, and from the natural meaning of the words here used, that if she could not take the annuity she could not take the legacy. There could be no option if she could take only one of the two things, and therefore when you have an express option coupled with the words "in lieu and substitution," I think the meaning clearly is, that if she likes she may commute into a capital sum and put into her pocket the benefit given to her in the first instance by way of annuity; but if the annuity is not given her, then it does not appear possible to say that she is entitled to the capital sum.

This would have been my opinion, without reference to any general rule; but I cannot help thinking that the general rule as to a substitutionary gift being subject to the same conditions as the original gift does not depend on the circumstance of the original gift being by will and the substituted gift by codicil, but

(1) 5 My. & Cr. 145. (2) 5 My. & Cr. 152.

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on the natural inference from a gift being given by way of substitution or in lieu of another. In that point of view, the way in which the general rule is shortly expressed by Sir *Lancelot Shadwell* in the case of *Earl of Shaftesbury* v. *Duke of Marlborough* (1), where the question was whether an annuity given by way of substitution for another annuity was to be free of duty as the original annuity had been, seems worth reading. He says: "When the thing bequeathed by the codicil, is given as a mere substitution for that which is bequeathed by the will, it is to be taken with all its accidents. Therefore, the legacy duty on the annuity given by the codicil, must be paid out of the testator's residuary estate." Here the legacy was to be taken in substitution for the annuity, and therefore could only be taken in the case of the lady being entitled at her option to take the annuity.

LORD COLERIDGE, L.C.J.:—

I am of the same opinion, and for the same reasons.

COTTON, L.J.:—

I am of the same opinion. In construing a will of this kind it is very seldom one can get any assistance from other cases except so far as they lay down principles. It was said that *Rishton* v. *Cobb* (2) was the case on which the argument turned in the Court below; but *Rishton* v. *Cobb* does not lay down any principle applicable to it. It was a case on a very different will. Whether rightly or wrongly Lord *Cottenham* held that there was there an absolute gift of an annuity to be cut down only in the event of marriage after the testator's death. But in the present case it could not be contended that the annuity was given absolutely so as to make it a perpetual annuity. The gift commences with the limitation of a period "To pay to my said wife so long as she shall continue my widow and unmarried." So the annuity was in its creation determinable. The argument was that the limitation referred substantially only to one event, namely, her marrying somebody else. But the will refers to her widowhood as well as to her future marriage. Probably the latter was unnecessary,

(1) 7 Sim. 237, 238. (2) 5 My. & Cr. 145.

but it was introduced in order to shew expressly that even if she was his widow at the time of his death a future marriage would determine the annuity. To say that if she had been in law a widow the reference to the future marriage would alone have been sufficient, and therefore the reference to widowhood may be treated as surplusage, is to alter the will. It is said, if the gift of the legacy to her describing her as his wife is not destroyed by the fact that she was not his wife at the time of his death, why should the reference to widowhood prevent this annuity from taking effect? In the case of the gift of the legacy to her *quâ* wife there is only a *falsa demonstratio;* the description of wife being intended merely to point out the individual. That is not so and cannot be so as regards the reference to the widowhood. The reference to widowhood is not made merely to point out the person, but it is to point to that which will fix the duration, the beginning, and the ending of this annuity. It fixes the period during which the annuity is to continue, and as the lady was not the testator's widow at the time of his death the annuity could never exist.

As regards the alternative gift of a capital sum, the argument in favour of its taking effect was subtle, but in my opinion, the view taken by the Lord Chancellor is right. Where the legatee from her own position at the time of the testator's death could not take the annuity in lieu and in substitution for which she might if she pleased take the capital sum, then in my opinion she is not in a position to say that she has an option given to her by the testator to take something in lieu of the annuity.

Solicitors for Plaintiff: *Ward, Mills, & Co.*
Solicitors for Defendants: *Sandilands, Humphry, & Armstrong.*

H. C. J.

C. A. 1883 V.-C. B. *Nov.* 23, 24. C. A. 1884 *Jan.* 23, 24.

In re SHERRY. LONDON AND COUNTY BANKING COMPANY *v.* TERRY.

[1882 S. 880.]

Debtor and Creditor—Principal and Surety—Guarantee of Current Account at a Bank—Death of Surety—Appropriation of Payments.

S. guaranteed the account of *T.* at a bank by two guarantees, one for £150, the other for £400. By the terms of the guarantees the surety guaranteed to the bank "the repayment of all moneys which shall at any time be due from" the customer "to you on the general balance of his account with you;" the guarantee was moreover to be "a continuing guarantee to the extent at any one time of" the sums respectively named, and was not to be considered as wholly or partially satisfied by the payment at any time of any sums due on such general balance; and any indulgence granted by the bank was not to prejudice the guarantee.

S. having died, leaving *T.* and another executors, the bank on receiving notice of his death, without any communication with the executors beyond what would appear in *T.'s* pass-book, closed *T.'s* account, which was overdrawn, and opened a new account with him, in which they did not debit him with the amount of the overdraft, but debited him with interest on the same, and continued the account until he went into liquidation when it also was overdrawn:—

Held, by *Bacon*, V.C., that payments in after the death of the surety went in discharge of the overdraft, alike on the terms of the guarantee, and on the principle of *Clayton's Case* (1), and that, as the amount of such payments exceeded the overdraft, the bank were not entitled to prove against the estate of the father-in-law.

Held, on appeal, that there was no contract express or implied which obliged the debtor and creditor to appropriate to the old overdraft the payments made by the debtor after the determination of the guarantee, and that the bank were entitled to prove against the estate of *S.* for the amount of the old overdraft less the amount of the dividend which they had received on it in the liquidation.

ADJOURNED SUMMONS.

On the 22nd of June, 1863, the testator, *John Sherry*, joined one *George Terry* in giving to the *Sandwich* branch of the Plaintiffs, the *London and County Banking Company, Limited*, a guarantee

(1) 1 Mer. 572, 605.

in favour of his (testator's) son-in-law, the Defendant *Edward Terry*, in the following terms:—

"Gentlemen,—In consideration of your allowing *Edward Terry*, of *Word Mill*, near *Sandwich*, miller, to overdraw his banking account current at the *Sandwich* Branch, we the undersigned, *John Sherry*, of *Stourmouth*, *Kent*, yeoman, and *George Terry*, of *Eastry* and *Sandwich Oilmill*, cornfactor and farmer, at our joint and separate request, do hereby guarantee to you the repayment of all moneys which shall at any time be due from him to you on the general balance of his account with you (such balance to include all interest, charges for commission, and other expenses which you may in the course of your business as bankers charge in respect of any advances or discounts made to him or on his account or for keeping his said account with you). And we hereby declare that this guarantee shall be a continuing guarantee to the extent at any one time of one hundred and fifty pounds, and shall not be considered as wholly or partially satisfied by the payment or liquidation at any time or times hereafter of any sum or sums of money for the time being due upon such general balance as aforesaid, but shall extend to, cover, and be a security for every and all future sum or sums of money at any time due to you thereon, notwithstanding any such payment or liquidation. And we further declare that you may grant to the said *Edward Terry*, or to any drawers, acceptors, or indorsers of bills of exchange or promissory notes received by you from him, any time or other indulgence, and compound with him or them respectively, without discharging or satisfying our joint and separate liability, and that all dividends, compositions, and payments received from them or him respectively shall be taken and applied as payments in gross, and that this guarantee shall apply to and secure any ultimate balance that shall remain due to the said company. And we further declare that this guarantee shall continue to be binding notwithstanding any changes that may from time to time take place in the shareholders in the said *London and County Banking Company*.

"*John Sherry*,
"*Geo. Terry*."

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On the 2nd of June, 1875, the testator gave to the Plaintiffs a further guarantee in the following terms:—

"To the *London and County Banking Company.*

"I hereby request you to permit Mr. *Edward Terry,* miller, of *Worth,* in the county of *Kent,* to keep his account with you, and I further request you from time to time to give him such credit and make him such advances by way of discount or otherwise as he may require and as you may think fit (either with or without security), and in consideration of your so doing I hereby guarantee to you the payment of all moneys which now are or which shall at any time be due from him to you on the general balance of his account, or for advances or otherwise (such balance to include all interest, charges for commission, and other expenses which you may in the course of your business as bankers charge in respect of any advances or discounts made to him or on his account or for keeping his said account with you), also the payment of all bills or notes which may be held by you and upon which he shall or may be liable to you, and of all costs, charges, and expenses which you may incur in enforcing or obtaining payment of such advances, balances, bills, or notes as aforesaid. And I hereby declare that this guarantee shall be a continuing guarantee to the extent of not exceeding £400, and that it shall not be considered as wholly or partially satisfied by the payment or liquidation at any time or times hereafter of any sum or sums of money which may for the time being be due to you as aforesaid, but shall extend to cover and be a security for all and every sum and sums of money which shall or may at any time be due to you from the said *Edward Terry* notwithstanding any such payment or liquidation. And I further declare that you may at any time or times at your discretion refuse further credit to the said *Edward Terry,* and that you may at any time or times at your discretion grant to him or to any drawers, acceptors, or indorsers of bills of exchange or promissory notes received by you from him, or on which he may be liable to you, any time or other indulgence, and compound with him or them respectively without discharging or satisfying my liability, and that all dividends, compositions, and payments received from them or him

respectively shall be taken and applied as payments in gross, and that this guarantee shall apply to and secure any ultimate balance that shall remain due to you the said company; and I further declare that this guarantee shall continue to be binding notwithstanding any changes that may from time to time take place in the shareholders in the said *London and County Banking Company*.

"*John Sherry*."

John Sherry, the guarantor, died on the 21st of March, 1880, having by his will appointed *Edward Terry* one of his two executors, by both of whom his will was proved on the 19th of May, 1880.

On notice of the death of *John Sherry* the banking company closed *Edward Terry's* account, which at this date was overdrawn to the extent of £677 17*s.* 2*d.*

The bank then opened a new account with *Edward Terry*, in which they did not debit him with the £677 17*s.* 2*d.*, but regularly debited him with interest on that sum, regularly crediting him also with all payments into the bank; and so matters continued until October, 1881, in which month *Edward Terry* filed a liquidation petition. At the date of the presentation of this petition there was an overdraft on the new account to the amount of £138 12*s.* 10*d.*

George Terry, the testator's co-guarantor, had become insolvent.

The action was commenced on the 23rd of February, 1882, by the banking company on behalf of themselves and all other the creditors of the testator, against *Edward Terry* and his co-executor for administration of the estate of *Sherry*, and a decree for administration was made on the 3rd of July, 1882. Under this decree the Plaintiffs claimed to be creditors for £508 7*s.* 11*d.*, being the difference between the overdraft on the old account, namely, £677 17*s.* 2*d.*, and the sum which the Plaintiffs had received by way of composition on that amount in the liquidation of *Edward Terry*, namely, £169 9*s.* 3*d.* The Chief Clerk disallowed the claim. The summons was to vary the certificate by finding the sum of £508 7*s.* 11*d.* to be due to the bank.

From the account as standing in the books of the bank it

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appeared that there never had been a balance in the Defendant's favour on the new account except for a day or two after the opening of it; but there had been sufficient payments in since the surety's death to discharge the sum of £677 17*s.* 2*d.*

The adjourned summons came on for hearing before Vice-Chancellor *Bacon* on the 23rd of November, 1883.

Hemming, Q.C., and *Charles Church*, for the summons:—

We do not care to dispute that upon the death of the testator the warranty given by the guarantees came to an end so far as any further advances were concerned.

The notion seems to be that the claim of the bank is negatived by *Clayton's Case* (1); but the rule in *Clayton's Case* is out of the question by the terms of the guarantees. Moreover, here there is an appropriation both by debtor and by creditor.

Kinnaird v. *Webster* (2) may be cited; but in that case there were no special terms in the guarantee; there were two separate concurrent accounts; and the balance was not always against the customer.

By the terms of the guarantees in this case the customer had a right to appropriate, and as a matter of fact he did appropriate the payments in the way in which they appear in the bank books; and if he had not done so, the bank could and did.

Marten, Q.C., and *R. Bramwell Davis*, *contrà*:—

The argument on the other side seems to neglect all the ordinary rights of debtor and creditor. Upon the death of the guarantor, the warranty no doubt ceased; but the account remained one and the same. The position of the surety imposed upon the bank terms from which they cannot escape. When the guarantee ceased to be a living guarantee, the bank were bound, if they wished to avail themselves of the guarantee, at once to have applied for payment. The words of the document are "all moneys which shall at any time be due from him to you on the general balance of his account." To such words as these the general rule must apply.

Kinnaird v. *Webster* is an authority in our favour.

(1) 1 Mer. 572, 605. (2) 10 Ch. D. 139.

When the warranty ceased, namely, on the death of the surety, the rule in *Clayton's Case* (1) came in. There was no appropriation by the customer. The bank might have applied or sued for payment, but having chosen to continue the account, they must abide by the ordinary rule. *Pearl* v. *Deacon* (2) shews that the bank were bound to apply any moneys received in discharge of the old balance.

Although the guarantee was discharged by the surety's death, there was no alteration in the contract.

Church, in reply :—

The case has been argued as if it were sought to deprive the surety of some right or security ; but there is nothing of the sort here. It has been contended that the moment the surety died the bank should have brought an action. How would that have benefited the Defendants ? Their rights were no higher then than they are now.

Clayton's Case only applies where no appropriation has been made. Here there was appropriation by the debtor, who knew by his pass-book how the account stood against him. *Pearl* v. *Deacon* and *Kinnaird* v. *Webster* (3) do not apply, because in those cases something was done to the prejudice of the surety.

BACON, V.C. :—

This case is not only covered by authority, but it is within the general principles of law which govern the relations of guarantor, debtor, and creditor.

The Defendant opens a banking account with the Plaintiffs, and in order to strengthen that account, and to improve his credit, a guarantee, or rather two guarantees, are given by his father-in-law to the Plaintiffs—one for £150, the other for £400. This state of things continues uninterruptedly until 1881, when the Defendant fails. In 1880 the guarantor had died, and upon his death, when the suretyship ended, his liability was limited to the amount then due upon the banking account.

No express notice was given by the bank, when they received

(1) 1 Mer. 572, 605. (2) 1 De G. & J. 461.
(3) 10 Ch. D. 139.

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notice of the guarantor's death, to the Defendant, as executor of the guarantor, of their intention to close the account; but they did close it, and they opened a new account with the Defendant, in which they charged him with interest on the former balance, and went on dealing with the new account in the same way as before until the failure of the Defendant took place.

Now they claim to be entitled to recover the full amount of the guarantee, and say that on the death of the surety a new account was opened, and that all payments made subsequently to that date are to be appropriated to that new account. But, upon the plainest principles of suretyship, a creditor cannot, without the consent of the surety, do anything to prejudice the rights of the surety. If the payment of the debt had been enforced against the executors at the time of the surety's death, they would have been compelled to pay it, and it might have been recovered at that time from the estate of the principal debtor, whose executor is now insolvent. So that, by the conduct of the bank, the right of the surety's estate has been, in my opinion, most distinctly prejudiced. It would be most unreasonable and intolerable that the estate of a man should be held liable for the balance of an account which was not the account he agreed to become surety for, but was another and totally different account, of which he had no knowledge.

Independently of the rule in *Clayton's Case* (1), the matter is quite clear and distinct upon the terms of the guarantee; and when the guarantee ceased, the doctrine which was well known as a principle of law before *Clayton's Case* was decided, and which is illustrated by that case, came into operation, namely, that payments made into a running account are to be applied, in the absence of appropriation by either party, in the liquidation of the earlier debts, so that their reduction may be carried on from time to time. The guaranteed debt is accordingly discharged, and the estate of the surety is under no liability in respect to it.

The conclusion to which the Chief Clerk has arrived is perfectly correct, and the summons must be dismissed with costs.

J. B. D.

(1) 1 Mer. 572, 605.

The bank appealed, and the appeal was heard on the 23rd and 24th of January, 1884.

Davey, Q.C., and *Russell Roberts*, for the appeal:—

The right to appropriate a payment is in the person who makes it; if he does not appropriate it then the payee can; if no specific appropriation is made but it is carried into a current account then *Clayton's Case* (1) applies. Here there was an appropriation to the new account by the payee with the assent of the person paying. If this decision be upheld it will be impossible for a bank to go on dealing with a customer after the death of a surety. In *Pemberton* v. *Oakes* (2) the surety was held to be discharged under the rule in *Clayton's Case*, but that was because the account was carried on as one account, which was not done here.

[EARL OF SELBORNE, L.C., referred to *Bodenham* v. *Purchas* (3).]

It never occurred to Lord *Lyndhurst* in that case that the existence of a contract of suretyship prevented the parties from making an appropriation of payments. In *Henniker* v. *Wigg* (4) the rule in *Clayton's Case* was held to be excluded by the course of dealing between the parties. Only two cases are referred to against us, and they are distinguishable. *Kinnaird* v. *Webster* (5) (which is explained in *Browning* v. *Baldwin* (6) as turning on the special terms of the guarantee) and *Pearl* v. *Deacon* (7), which only relates to the doctrine that a surety is entitled to the benefit of securities held by the creditor, and has therefore no application here. There is no case that supports the decision of the Vice-Chancellor. His Lordship laid stress on the fact that no notice was given by the bank to *Sherry's* representatives; but the debtor was one of the executors, so formal notice was unnecessary. The Chief Clerk found that the account was one account, but this is a patent error. The Vice-Chancellor urged that the new state of things was prejudicial to the surety; but the opening the account was no breach of any contract with the surety,

(1) 1 Mer. 572, 605.
(2) 4 Russ. 154.
(3) 2 B. & Ald. 39.
(4) 4 Q. B. 792.
(5) 10 Ch. D. 139.
(6) 40 L. T. (N.S.) 248.
(7) 1 De G. & J. 461.

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nor was there anything inequitable in it. There is nothing in the contract of suretyship to prevent the bank from having further dealings with the debtor, leaving the surety's estate liable for what was due at his death. In *Coulthart* v. *Clementson* (1) it was held that a continuing guarantee is revoked as to subsequent advances by notice of the death of the guarantor, and the estate of the guarantor was held discharged, but that was because the account had been carried on as one account, and so the rule in *Clayton's Case* (2) applied.

Marten, Q.C., and *R. Bramwell Davis*, *contrà*:—

The decision appealed from proceeds on the footing, which we submit is sound, that where a person guarantees a banking account it is an implied term of the contract that the account shall be carried on in the ordinary way. When the surety dies the bank may say we will have no further dealings with the customer unless the balance is now paid; but if they go on with the account they cannot deal with it on any other footing than that of an ordinary banking account. Could the bank have split up the account into two, carrying the credit items to the non-guaranteed account?

[EARL OF SELBORNE, L.C.:—You are suggesting a fraudulent device to prejudice the surety.

LORD COLERIDGE, L.C.J.:—Suppose the bank close the account for some months after the death of the surety, intending to close it finally. Can they not change their mind and open a new account with the customer?]

We contend that it would be a carrying on of the old account. It is not, however, necessary to determine that. There was here no real closing of the account; things went on after the death as they did before. As to *Kinnaird* v. *Webster* (3), we cannot lay much stress upon it, as it is a decision of the Judge whose decision is now under appeal, but we rely on *Pearl* v. *Deacon* (4), which goes on the principle that the creditor and principal debtor cannot deal together so as to prejudice the surety.

(1) 5 Q. B. D. 42.
(2) 1 Mer. 572, 605.
(1) 10 Ch. D. 139.
(2) 1 De G. & J. 461.

[EARL OF SELBORNE, L.C.:—It was a strong application of the principle that the surety is entitled to the benefit of all securities held by the creditor; but it has no application here, for there is no such security in this case.]

In *Kinnaird* v. *Webster* (1) Vice-Chancellor *Bacon* shews that the principle of *Pearl* v. *Deacon* (2) applies to a case like the present. *Holme* v. *Brunskill* (3) shews that new arrangements cannot be entered into by the creditor and debtor which prejudice the surety. It is urged that maintaining this decision will make it impossible for a bank to go on dealing with a customer after the death of a surety. But they have two courses open; they may provide for the case by special terms in the contract of suretyship, or they may say to the surety's representatives, "We intend to open a fresh account with the customer reserving your liability." Then the representatives will have the opportunity of determining whether they will not pay off the balance and sue the customer. The bank have let matters go on till our remedy against the estate of the principal debtor is lost by his insolvency. Could the bank during the life of the surety stop on a particular day and open a fresh account.

[EARL OF SELBORNE, L.C.:—It appears to me that merely splitting the account in that way in the father's lifetime would have no effect.]

Then is not the case the same here?

[COTTON, L.J.:—No. You admit that the account here is split effectually, for you say you are not liable for the advances after the death.]

[*Harriss* v. *Fawcett* (4) was also referred to.]

EARL OF SELBORNE, L.C.:—

The Vice-Chancellor has decided this case upon the view that there was either an express or an implied contract to appropriate payments received from the debtor after the guarantee had ceased to the discharge of the guaranteed debt. If that were so the

(1) 10 Ch. D. 139.
(2) 1 De G. & J. 461.
(3) 3 Q. B. D. 495.
(4) Law Rep. 8 Ch. 866.

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judgment would certainly be right. If it is not so, then it seems to me that the judgment cannot be supported.

The principle of *Clayton's Case* (1) and of the other cases which deal with the same subject, is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he *primâ facie* appropriates them to that account, and the effect of that is, that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that account.

It is, of course, absolutely necessary for the application of those authorities that there should be one unbroken account, and entries made in that account by the person having a right to appropriate the payment to that account; and the way to avoid the application of *Clayton's Case*, where there is no other principle in question, is to break the account and open a new and distinct account. When that is done, and the payment is entered to that new and distinct account, whatever other rule may govern the case, it certainly is not the rule of *Clayton's Case* or of *Bodenham* v. *Purchas* (2), and other authorities of that class. In this case the account was broken. It was not continued; and, if he had a right to do so, the creditor receiving moneys after the death of Mr. *Sherry*, elected to appropriate them to the new account, and not to the old account, whatever might be the proper consequences of that election.

Therefore, we are remitted to the question whether there was here an express or an implied contract to appropriate these moneys in reduction of the secured or guaranteed debt. If there was, of course, that contract could not be defeated by any mode of keeping the account which the creditor might prefer; the contract must prevail; and in that case, no doubt, the principle of *Pearl* v. *Deacon* (3), which dealt with securities (and I agree that moneys which by contract are appropriated to a particular purpose stand as regards the surety on the same footing as securities) would be applicable.

(1) 1 Mer. 572, 605. (2) 2 B. &. Ald. 39.
(3) 1 De G. & J. 461.

First, then, is there here any express contract to appropriate payments received subsequently to the termination of the guarantee towards the secured or guaranteed debt? The only words in the document referred to in support of the argument that there was such a contract were these: "We, the undersigned, *John Sherry* and *George Terry* do hereby guarantee to you the repayment of all moneys which shall at any time be due from *Edward Terry* to you on the general balance of his account with you." It was contended that the effect of that was to entitle the surety to say that any sums which on the general balance of any account between *Edward Terry* and the bankers might be received by the bankers should be appropriated to the guaranteed debt. This is a question of construction, and, as a matter of construction, it is clear that the account there mentioned is merely the guaranteed account. The word "account" occurs only in the definition of that which is guaranteed: "all moneys which shall at any time be due from him to you on the general balance of his account with you," and it is quite impossible to extract from those words an agreement to apply in reduction of the guaranteed account moneys which do not properly enter into it. There is therefore no express agreement that any such moneys should be so applied. I assume, as we are bound to assume (for it has been so decided, and there is no appeal from it), that the guarantee, though not expressed to terminate on the death of either of the guarantors, did so terminate. I am quite aware that this has been, in some cases, a controverted question, and it may not be considered to be finally settled; but I must assume it to have been rightly determined in the present case. If so, it is quite clear that there is no express contract of the kind for which the Respondents contend.

Then, is there an implied contract to that effect in favour of the surety? A surety is undoubtedly and not unjustly the object of some favour both at law and in equity, and I do not know that the rules of law and equity differ on the subject. It is an equity which enters into our system of law, that a man who makes himself liable for another person's debt is not to be prejudiced by any dealings without his consent between the secured creditor and the principal debtor. If, therefore, it could be shewn that

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what has been done here was done without the consent of the surety in prejudice of an implied contract in his favour, I quite agree that he ought not to suffer from it. But there being no express contract, on what ground is it to be said that there is an implied contract? I am unable to find any such contract, unless we are to hold that the mere fact of suretyship takes away from the principal debtor and the creditor those powers which they would otherwise have of appropriating payments which are not subject to any particular contract with the surety. Now it seems to me that although there may not be a case in the books in every respect precisely the same as this, the cases of *Kirby* v. *Duke of Marlborough* (1) before Lord *Ellenborough* in 1813, and *Williams* v. *Rawlinson* (2) before the Court of Common Pleas in 1825, govern it *à fortiori*.

The facts in those cases were these. A guarantee of the same nature as that in the present case was given: the debtor was already indebted upon an existing account to the guaranteed creditor in a large sum of money, and that pre-existing debt was not mentioned in the contract of suretyship. In one of those cases it appeared that the fact of the pre-existing debt was not known to the surety when he gave the guarantee, and in the other there was nothing to shew that it was known to him. The question arose, whether the creditor was entitled to apply payments received from the debtor towards the pre-existing debt, or whether he was bound to apply them in reduction of the guaranteed debt. It was decided in both those cases that he was entitled to apply them to the pre-existing debt, and was not bound to apply them in reduction of the guaranteed debt. A point somewhat similar, although not exactly the same, arose in the case of *Hollond* v. *Teed* (3), which is one of the cases in favour of the doctrine that a guarantee of this sort is terminated by death. There were outstanding bills not yet matured or payable which were covered by the guarantee, and there was a cash balance of £124 standing to the credit of the debtor with the secured creditor at the time of the death of the partner whose death was held to determine the guarantee. The account was continued in

(1) 2 M. & S. 18. (2) 3 Bing. 71.
(3) 7 Hare, 50.

the ordinary course, and the debtor was permitted to draw out that balance before the bills became due. The bills afterwards becoming due resulted in a debt, in respect of which the benefit of the guarantee was claimed; and after consideration the Vice-Chancellor held that these payments to the debtor being made in the ordinary course of business before the debt upon the bills had become due, were to be treated as properly made, and that the surety had no equity to require the creditor to retain the balance in his hands as a security against the bills, there being no express stipulation to that effect. It appears to me that the principle of those cases shews, if it were necessary to have authority for the purpose, that the right of appropriation of payment to an account not guaranteed is not taken away by a contract of this kind. Consequently this appeal must be allowed and the judgment of the Vice-Chancellor reversed.

LORD COLERIDGE, L.C.J.:—

I desire, with the Lord Chancellor, to reserve any expression of opinion upon the important and interesting question whether the guarantee was determined by notice of the death of the surety, this question not having been raised on the present appeal, but as to the points on which the Lord Chancellor has expressed an opinion, I entirely agree with him.

COTTON, L.J.:—

I am of the same opinion.

The question is whether there is anything in the contract to prevent the bank from carrying these payments to the new account. There is certainly no express contract, and in my opinion there is no implied contract to that effect. The guarantee, according to the decision which the surety has obtained, is a guarantee only dealing with the account between the bank and the creditor until the bank receives notice of the death of the surety, so that no further dealings can take place on the faith of this guarantee after the death. As far as I see, the only implied contract is that the account shall be carried on in accordance with the general practice of bankers; and that really answers

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what has been suggested, that this case does not differ from an attempt by a bank to make a new account during the lifetime of the surety, that is to say, before the guarantee terminates. The balance which the surety guarantees is the general balance of the customer's account, and to ascertain that, all accounts existing between the customer and the bank at the time when the guarantee comes to an end, must be taken into consideration. So that it would be impossible for the bank to say, to the prejudice of the surety, "We carry these sums which have been paid by the customer not to an account of which we ascertain the balance, but to a new account, and we refuse to bring those sums to the credit of his banking account to the relief of the surety." That is quite a different thing, and would be an improper dealing, improper in this sense, that it would prevent the balance of the account from being ascertained in accordance with the terms of the guarantee. But here the account to which these payments have been appropriated is one which, according to the contention of the surety, is not guaranteed in any way, being an account after the death of the surety, and there being nothing in the contract relating to the mode in which the bank was to deal as regards that account, there is nothing to prevent the bank from acting as they have done. Therefore, in my opinion, the decision of the Vice-Chancellor was wrong, and must be reversed.

Solicitors: *Harries, Wilkinson & Raikes; A. R. & H. Steele.*

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A Defendant made default in putting in a statement of defence under Order XXIX., r. 10 (1875), and the Plaintiff gave notice of motion for judgment in default of defence. But before the motion was heard the Defendant put in a statement of defence.

Held, that the statement of defence, though put in after time, could not be treated as a nullity, and that the Plaintiff was not entitled to judgment in default of defence.

But as the statement of defence disclosed no real defence to the action, the Court of Appeal ordered the notice of motion to be amended and judgment to be given for the Plaintiff on the admissions in the statement of defence.

THE action in this case was brought for sale or foreclosure of the premises comprised in an equitable mortgage by the deposit of deeds to secure the repayment of £210 and interest due from the Defendant to the Plaintiff.

The statement of claim was delivered on the 12th of February, 1881.

On the 14th of February, 1882, no defence having been put in, the Plaintiff served notice of motion on the Defendant under Order XXIX., rule 10, for such judgment in default of defence as the Court might consider the Plaintiff entitled to.

The motion came on before Vice-Chancellor *Bacon* on the 18th of February, but in consequence of a doubt whether the service of the notice was regular, the motion was ordered to stand over for a fortnight with liberty to the Plaintiff to amend and re-serve his notice of motion.

The Plaintiff accordingly served his notice in the same form on the 18th of February.

In the meantime, on the 15th of February the Defendant delivered a statement of defence in which he substantially admitted the Plaintiff's claim.

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The motion was heard on the 4th of March, when the Vice-Chancellor, treating the statement of defence as a nullity, gave the ordinary judgment in a foreclosure action as in default of a statement of defence.

On the 17th of February, 1883, the Defendant gave notice of appeal from the judgment of the Vice-Chancellor, and shortly afterwards paid the debt with interest and costs, without prejudice to his appeal; the deeds were given up.

Strickland, for the Appellant:—

The judgment was irregular, because before it was pronounced the Defendant had put in his defence, and therefore was not in default. The defence was no doubt after time, but it was not on that account a nullity. The exact point has been decided with respect to a reply in *Graves* v. *Terry* (1).

Hemming, Q.C., and *Alan Stewart*, for the Plaintiff:—

The present appeal is entirely useless, for the Defendant has paid the debt and costs and the deeds are given up. It cannot be right that a fresh judgment should be made and the whole thing done over again. The statement of defence put in shews no real defence, and if it had been read the Plaintiff would have been entitled to a judgment on the admissions. But the Judge was justified in treating the defence as a nullity, as it had not been put in till after the first notice of motion had been served. *Graves* v. *Terry* is decided on a different rule. At the most there is only a defect in form, as the same judgment might have been given on admissions in the pleadings if the defence had been considered.

EARL OF SELBORNE, L.C.:—

I regret that it has been thought necessary to incur the expense of bringing this appeal. In substance nothing can be more proper than the judgment of the Vice-Chancellor. It is an ordinary case of equitable mortgage by deposit with no special term which could be an answer to the claim of the mortgagee to

(1) 9 Q. B. D. 170.

foreclosure. The judgment of the Vice-Chancellor gives him this in the ordinary form. If the same order had been made on the admissions in the statement of defence, no objection could have been made to it; but unfortunately, instead of the Plaintiff taking the order on the admissions, he took it as in default of defence, thinking that as the defence was put in after the proper time he was entitled to treat it as a nullity. That was a mistake. There is nothing in the orders to the effect that a statement of defence which is put in after the time has expired may be treated as a nullity. But as I think the judgment right in all respects except in form, and looking at the circumstance that the judgment has been worked out and the money paid and the deeds delivered up, I should consider it a great misfortune if on a mere matter of form we were obliged to disturb the order where full justice has been done under it. In order to prevent such a failure of justice, the rules have provided that the Court of Appeal shall have all powers of amendment which the Court below has. In my opinion, if an application had been made to the Vice-Chancellor at the time of hearing the motion, that the notice of motion should be amended by altering it to a motion for judgment on the admissions in the defence, he would have granted it, and would have given the same judgment. We can now give leave to amend in the same way under Order LVIII., rule 4; and, the Plaintiff being willing to make that amendment, we now allow the amendment; and, the amendment being made, we think the order quite right, and dismiss the appeal; but under the circumstances each party must bear his own costs.

COTTON, L.J.:—

I agree. The order in form was in my opinion wrong; the Plaintiff had no right to take such a judgment when the defence had been delivered. But it would be wrong for us to discharge that order if the same order might have been made on a different form of motion. The Defendant appeared on the motion, and the defence ought to have been considered by the Judge. If he had done so he would have made the same order, for the Defendant had really no defence to the action. I agree with

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the course proposed by the Lord Chancellor, though I think we might have made the proper order under Order LVIII., rule 4, without amending the original notice of motion.

LINDLEY, L.J.:—

I agree, and have nothing to add.

Solicitors for the Plaintiff: *Hilleary & Co.*
Solicitors for the Defendant: *Woodfin & Co.*

M. W.

C. A. 1884 Jan. 29, 30.

STOTT *v.* MILNE.

[1882. S. 3549.]

Trustees—Costs, Charges and Expenses—Retainer of Income to meet Expenses of Actions.

The trustees of a freehold estate of which the Plaintiff was equitable tenant for life under a will, brought actions under the advice of counsel against two persons for interfering with the property, and compromised them before trial. The Plaintiff had no notice of the proceedings, but had some time previously warned the trustees, on the occasion of an injury done by persons other than the defendants to these actions, that he should hold them liable if they did not take all necessary steps to protect the property. In December, 1881, the Plaintiff applied to the trustees for the rents accrued since May, 1880. The trustees' solicitor answered stating the amount of the rents received, and saying that it was less than the costs incurred by the trustees in the action, and that they were out of pocket. A correspondence ensued, in the course of which the trustees expressed their willingness to concur in any arrangement for raising the costs out of the estate, but the Plaintiff insisted on having the rents paid to him irrespective of any arrangement for raising the costs, and brought his action to enforce payment. The Vice-Chancellor of the *Lancaster* Court made an order declaring that as the actions were brought without the knowledge or consent of the Plaintiff, the costs were not chargeable against the income. And the Court "being of opinion that the actions were commenced under the advice of counsel," ordered the trustees' costs of them to be raised and paid out of the estate, but ordered the trustees to pay the Plaintiff his costs of the present action up to the hearing. The Plaintiff appealed against the direction to raise the costs of the former actions out of the estate, and the trustees from the order as to the costs of the present action.

Held, on appeal that the direction to raise the costs of the trustees of

the old actions out of the estate ought to be affirmed, for that the actions appeared to have been brought *bonâ fide* and to have been beneficial to the estate, but that the reason given in the decree for allowing them ought to be varied, as that result did not necessarily follow from their having been commenced under the advice of counsel.

But *held*, that the order on the trustees to pay costs must be reversed, and directions given for raising their costs of this action out of the estate, for that the costs of trustees properly incurred in the administration of the trust are a first charge on both the capital and income of the trust estate, and that the trustees were not bound to part with the income till their costs had been otherwise provided for, and they therefore had been guilty of no misconduct.

JAMES STOTT MILNE, by will, dated the 24th of March, 1853, devised a farm called *Long Acres Farm* and his lands, cottages and buildings at *Bridge Mill* to trustees, upon trust out of the rents and profits to keep the cottages and buildings at *Bridge Mill* in repair, and to pay the residue to *Robert Stott* for life, and after his death to the Plaintiff for life, with divers gifts over. The testator died on the same day, and *Robert Stott* died in 1867.

In June, 1882, the Plaintiff commenced this action against the trustees, alleging that they had paid him nothing in respect of the rents since July, 1880, and had rendered him no account till the 26th of May, 1882. That the account then furnished were erroneous, and shewed that a sum of £175 18*s.* 11*d.* was on the 11th of October, 1881, retained out of income and applied in payment of the costs incurred by the Defendants in an action in which the Defendants had sued one *Welsh*. That if those costs were properly incurred they ought to be paid out of *corpus* and not out of income. The Plaintiff asked for a declaration that the retention and appropriation by the Defendants of income in manner thereinbefore stated was a breach of trust, and for an account of the rents.

It appeared that the costs in question had been incurred in an action commenced in 1879 by the Defendants against *Taylor* and others in respect of wrongs alleged to have been committed by *Taylor* and others about the *Long Acres Farm*, and in another action against *Welsh* for wrongs alleged to have been done by him to the trust estate. In 1872, certain proceedings by Messrs. *Rawstron* were complained of as injurious to the estate, but the

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Plaintiff was desirous that no proceedings should be taken against them, and in that year he gave the trustees an indemnity against any liability they might incur by not bringing any actions in respect of the acts complained of. In 1873, the Plaintiff withdrew this indemnity, and gave the trustees notice that he should hold them liable if they did not take such steps as were necessary for the protection of the property. Proceedings were accordingly in that year commenced against the *Rawstrons*, and carried to a successful issue. In 1879, the Defendants, without communication with the Plaintiff, commenced the actions against *Taylor* and others, and against *Welsh*, and carried them on without consulting him. In July, 1880, the actions came on for trial and were compromised.

Before the institution of this suit, a correspondence had taken place between the solicitors of the Plaintiff and the Defendants, which commenced on the 3rd of December, 1881, by a letter asking for payment of the sum in the hands of the Defendants in respect of rents accrued since May, 1880. The Defendants' solicitors replied stating that they had received £160 13*s.*, and had paid for the balance of the costs in the action against *Welsh* £175 18*s.* 9*d.*, and were therefore out of pocket. After some further letters had passed, the Defendants' solicitors on the 6th of January, 1882, wrote stating that the proceedings had been absolutely necessary for the protection of the estate, and that the Defendants would be willing to meet the Plaintiff in any reasonable suggestion as to the raising and payment of the costs of them. In a subsequent letter in May, 1882, the Plaintiff's solicitor wrote: "Mr. *Stott* distinctly declines to allow any portion of the costs referred to in your letters to be deducted from the amount due for income. Upon your satisfying us that the actions were properly commenced for the benefit of the property to which they refer and were properly compromised, our client will be ready, if and so far as it may be needful for him so to do, to concur with your client in raising by charge upon the *corpus* of such estate such sum for costs as, upon the bill of costs being submitted to us, may be found to be properly so chargeable, but this must be kept absolutely distinct from the question of account and payment over of income."

The present action came on for trial before the Vice-Chancellor

of the Court of the County Palatine of *Lancaster*, and on the 16th of January, 1883, an order was made as follows:—

"This Court being of opinion that the actions of *Milne* v. *Welsh* and *Milne* v. *Taylor* in the pleadings mentioned were brought by the Defendants as trustees of the will of the testator in the pleadings named without the knowledge, consent, or concurrence of the Plaintiff, doth declare that the costs of such actions respectively were not and are not chargeable against the income of the testator's estate, payable to the Plaintiff as tenant for life under the said testator's will." An account was directed of rents received by the Defendants since the 7th of May, 1880. "And the Court being of opinion that the said two actions were commenced under the advice of counsel, doth order that so much of the costs of the Plaintiffs in such actions as was not ordered or agreed to be paid by the Defendants therein be taxed," and it was ordered that the amount of the taxed costs should be raised under the direction of the district registrar by a sale or mortgage of a sufficient part of the *Long Acres Farm*, or, if necessary, of the whole thereof. And it was ordered that the Defendants should pay to the Plaintiff his costs of this action up to and including the hearing.

The Plaintiff appealed, asking that the order might be varied in so far as it ordered the costs of the actions of *Milne* v. *Welsh* and *Milne* v. *Taylor* to be taxed and raised, and asked that those costs might be wholly disallowed. He also asked for other variations which do not appear to call for a report. The Defendants gave a cross notice that they should ask to have the ordered varied so far as it directed the costs of the action to be paid by the Defendants, and should contend that those costs ought to be taxed and paid in the same way as the costs of the actions of *Milne* v. *Taylor* and *Milne* v. *Welsh*. The appeal was heard on the 29th and 30th of January, 1884.

Robinson, Q.C., and *Maberly*, for the Plaintiff.

Rigby, Q.C., and *Hopkinson*, for the Defendants.

EARL OF SELBORNE, L.C.:—

I feel no doubt that the trustees acted *bonâ fide* and reasonably

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in bringing the actions. The property was peculiarly circumstanced, it was not large, but was available for building purposes, and anything done by tenants or neighbours which would give any other persons rights over it might cause a material depreciation in its value. The trustees therefore had an anxious duty to perform, which was not rendered less anxious by the course taken by the Plaintiff. In 1872, he, being desirous of avoiding actions, gave the trustees an indemnity for not bringing any; but he afterwards changed his mind, withdrew the indemnity, and gave the trustees notice that he should hold them liable if they did not take proper steps to protect the estate. Under these circumstances we ought to be clearly satisfied that the actions were improper before we reverse the decision that the costs of them were properly payable out of the estate. I think, however, that the reason given in the decree for allowing them is not sufficient, and ought to be varied, because it states merely that they were commenced under the advice of counsel. Now, I cannot say that because an action is advised by counsel it is always and necessarily one which trustees may properly bring. The advice of counsel is not an absolute indemnity to trustees in bringing an action, though it may go a long way towards it. The actions were compromised before trial. That the result of the first action was beneficial to the estate is clear. Whether the estate was benefited by the second action is disputed, but I am disposed to think that it was. Looking at the whole circumstances, at the manifest *bona fides* of the trustees, and at the opinion of the Vice-Chancellor that the costs ought to be allowed, I am of opinion that the direction for payment of them out of the *corpus* must be sustained.

Then as to the second appeal, the Vice-Chancellor has ordered the trustees to pay the costs up to the hearing. This is a severe order, which can only be justified by misconduct on their part, and I cannot find any misconduct which would justify it. The only thing urged against them is that they retained the costs of the actions out of the income, and they are alleged also to have insisted that the tenant for life should bear them. But did they so insist in any such way as to amount to misconduct? I think not. On referring to the correspondence, we find that the trustees before

this action expressed themselves ready to concur in any reasonable arrangement as to the raising and paying the costs. Under these circumstances it would be very harsh to make them pay costs because they refused to part with the income until the costs of the former actions had been paid. If they had had no right to retain their costs out of the income the case would have stood very differently, and perhaps the Vice-Chancellor thought that they had not; but if he was of that opinion I cannot agree with him. The right of trustees to indemnity against all costs and expenses properly incurred by them in the execution of the trust is a first charge on all the trust property, both income and *corpus*. The trustees, therefore, had a right to retain the costs out of the income until provision could be made for raising them out of the *corpus*. I am of opinion that their costs of this action ought to be raised and paid out of the estate in the same way as the costs of the former actions.

COTTON, L.J.:—

I agree, for the reasons given by the Lord Chancellor.

LINDLEY, L.J.:—

I am of the same opinion on all points.

Solicitors for Plaintiff: *Earle, Sons, & Co., Manchester.*
Solicitor for Defendants: *Thomas Parker.*

H. C. J

C. A.
1883
C. J. B.
June 11.
C. A.
1884
Feb. 1.

Ex parte CALDICOTT.
In re HART.

Proof in Bankruptcy—Secured Creditor—Valuation of Security—Partnership Debt—Security on Separate Estate—Mutual Credit—Set-off—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 39.

A father and son were partners in business. The father mortgaged real estate, which was his separate property, to the bankers of the firm, to secure the balance for the time being of the current account of the firm. Afterwards he contracted to sell the real estate, and the bankers joined in the conveyance to the purchaser on the terms of an agreement that the father should deposit the purchase-money with the bankers in his own name, at interest; that the deposit should be a security to the bankers for the debt of the firm, but that, subject to that security, the deposit should remain the separate property of the father; that, until payment of the debt of the firm, the father should not be entitled to withdraw any part of the deposit, but, until demand by the bankers for payment of the debt, he should be at liberty to draw out half yearly the interest on the deposit; and that, in case demand should be made by the bankers for payment, they might, at any time after the expiration of twelve months from the making of the demand, but not sooner, apply the deposit, and the interest thereon from the time of making the demand, in or towards the payment of the debt of the firm. The father also entered into a covenant for payment of the debt of the firm. This arrangement was carried out.

Held, that, the arrangement being a *bonâ fide* one for the purpose of giving a security to the bankers, in substitution for their security on the real estate, the bankers could prove in the liquidation of the father and son against the joint estate for the full amount of their debt, without deducting the amount of the deposit, and that no set-off arose by virtue of sect. 39 of the *Bankruptcy Act*, 1869.

JAMES HART and *James Hart* the younger (father and son) carried on business in partnership at *Coventry* under the firm of *Hart & Son*. They kept a banking account with *Lloyd's Banking Company*. On the 3rd of July, 1880, the father executed to the company a mortgage of some real estate, called the *Copsewood* estate, which was his separate property, to secure the balance for the time being owing from the firm to the company, not exceeding £12,000 in amount. In the year 1881 the father entered into an agreement for the sale of a part of the mortgaged estate, and requested the company to concur in the conveyance thereof to

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the purchaser. They consented to do so upon certain terms, which were contained in a deed, dated the 3rd of June, 1881, and made between the father and the company. This deed contained a recital that the father had placed the sum of £8750, part of the purchase-money of the property sold, on a deposit account with the company in his own name, carrying interest at 5 per cent. per annum, and that the company had concurred in conveying the property to the purchaser. And it was thereby agreed that the £8750 so placed on deposit should be a security for, and stand charged with, the payment to the company of the balance for the time being owing from the firm to the company on their current account, but that, subject to such security, the said principal sum and the interest to accrue due thereon should remain the separate property of the father; that, until payment of the balance due by the firm to the company, the father should not be entitled to withdraw the £8750 or any part thereof, but, until demand should be made by the company for payment of the balance, the father should be at liberty to draw out half-yearly the moneys carried to his credit in respect of interest on the principal sum; and that, in case demand should be made by the company for payment of the balance due to them by the firm, it should be lawful for the company, at any time after the expiration of twelve months from the making of such demand, but not at any earlier period, to apply the £8750, and the interest accrued due in respect thereof from the time of making such demand, in or towards payment of the balance due from the firm and the interest to accrue due thereon. By this deed the father also entered into a covenant with the company that the persons for the time being carrying on the business of the firm would on demand or without demand pay the balance due on the current account of the firm.

On the 18th of April, 1882, the father and son filed a liquidation petition in the *Coventry* County Court, under which a trustee was appointed. On the 19th of May, 1882, the banking company served on the trustee a notice in writing, demanding payment of the balance due to them by the firm. On the 17th of October, 1882, the company tendered to the trustee a proof against the joint estate of the firm for £17,093 19*s.*, the amount

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of the balance due to the company by the firm at the date of the filing of the liquidation petition. On the 30th of November, 1882, the trustee rejected the proof to the extent of £8750, on the ground that "cash of the said *James Hart* was deposited by him with you, and was lying in your hands at the date of the institution of the proceedings in the liquidation, the whole of which sum was and is applicable under the liquidation to the payment of your debt of £17,093 19*s.*, and should be deducted from your proof."

The Judge of the County Court ordered the proof to be admitted for the full amount.

The trustee appealed to the Chief Judge. The appeal was heard on the 11th of June, 1883.

Winslow, Q.C., and *Pinsent*, for the Appellant:—

At the date of the liquidation the father was liable to the bank upon his covenant to pay the debt of the firm, and the bank also owed the £8750 to the father. The father, being a liquidating debtor, a set-off under sect. 39 must be taken at once and the balance only is due: *Ex parte Barnett* (1). And after this set-off, the balance only remains owing from the firm; also this is a realised asset at the date of liquidation, and must be applied therefore in part payment of the debt: *Ex parte Todd* (2); *Ex parte Leers* (3). *Ex parte Watson* (4) is distinguishable.

Cooper Willis, Q.C., and *Yate Lee*, for the Banking Company, were not called on.

BACON, C.J.:—

I do not think I need call for any answer to the arguments in support of this appeal. The transaction is as clear as can be. There are transactions between the firm and the banking company of a pecuniary character, and the senior partner deposits with them a mortgage of property of his own as security for any money which that firm shall owe jointly to the bank. The mortgage of that estate is completed and the proviso for redemption

(1) Law Rep. 9 Ch. 293.
(2) 2 Rose, 202, n.
(3) 6 Ves. 644.
(4) 28 W. R. 632.

which it contains is not to the firm but to the senior partner, and the firm cannot lay any claim to the proceeds of the estate. The estate is sold with the consent of the bank, and the purchase-money to the amount of £8750, deposited with the bank, and that being so, it is liable to the payment of the debts of *James Hart* the elder, and his debts only, and the joint creditors of the firm have nothing to do with it at all. The only person interested in the estate agrees that the money shall remain in the possession of the bank standing to the credit of *James Hart* the elder, and that it shall remain subject to the legal rights of the original owner. The firm becomes bankrupt, and the separate estate of *James Hart*, the elder, has to be administered in bankruptcy among the separate creditors, and the joint estate amongst the joint creditors, but the joint creditors can have nothing to say about the assets of the estate until the separate creditors have received 20*s.* in the pound. It has been argued that this is a case of mutual dealings within sect. 39, between *James Hart* the elder and the bankers. I think there have been no mutual dealings.

There have been a multitude of cases on the subject, one of which is *In re Plummer* (1). In that case, as in many others, the principle has been clearly laid down that in cases like the present collateral securities are not to be administered in bankruptcy, and that the rights of the various parties must be worked out between the parties interested, so that the joint creditors can, under no circumstances, have anything to do with that £8750. Mr. *Winslow* has said that where a variety of persons are liable upon proofs, and there is a right of joint and separate proof, then the right of set-off is plain. If I have a right of proof against a man and have £500 of his money in my possession there is a right of set-off to the extent of the £500. I can see nothing in this case to take it out of that plain principle. Mutual dealings have nothing to do with the case before me. It is plain that the creditors of the joint estate cannot succeed in claiming anything until the creditors of *James Hart* the elder shall have been paid out of the separate estate their claims in full. The simple proposition of the Appellants is this: the bank takes a collateral security

(1) 1 Ph. 56.

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to secure a debt which the firm of the guarantor may owe to them hereafter, and the bank is bound to administer that in bankruptcy, and to give credit for it before the bank can prove and get a dividend out of the joint estate. There is no ground for this argument of the Appellant, and no decision in favour of it. In my judgment the law is so clear and plain, and the facts undisputed, and so entirely in accordance with what I consider to be the settled law, that I ought not to hesitate one moment in dismissing this appeal with costs.

F. G. A. W.

C. A.

From this decision the trustee appealed.

The appeal was heard on the 1st of February, 1884.

Winslow, Q.C., and *Pinsent*, for the Appellant:—

The object of the arrangement made by the deed of the 3rd of June, 1881, was to evade the provisions of the *Bankruptcy Act*, and to treat the purchase-money of the land sold as if it was still real estate, instead of, as it really was, a debt due from the bank to the father. The bank could not, it is true, have set off the £8750 against the debt of the firm without notice to the father, but still the £8750 was a debt due by them to him. If the father had sued the bank for the £8750 they could have set off the debt of the firm against it. Sect. 39 of the *Bankruptcy Act*, 1869, took effect immediately on the filing of the liquidation petition: *In re Milan Tramways Company* (1)), and compelled a set-off of the £8750 against the balance due by the firm to the bank, so that only the balance due on either side could be claimed by the trustee, or proved in the liquidation, as the case might be. The fact that a debt is secured makes no difference as to this statutory set-off: *Ex parte Barnett* (2). At any rate the notice served by the bank on the trustee, on the 19th of May, 1882, demanding payment of the balance due to them, is sufficient to make sect. 39 apply. Payment by the trustee could only be by means of a proof in the liquidation.

The bank could by giving notice have made the deposit in their hands applicable to payment of the debt of the firm, and it

(1) *Ante*, p. 587. (2) Law Rep. 9 Ch. 293.

has been held that if the holder of a bill of exchange seeks to prove on it against the estate of the acceptor, he must give credit for dividends declared in the bankruptcy of an indorser against whose estate he has also proved, though he has not actually received those dividends: *Ex parte Royal Bank of Scotland* (1); *Ex parte Todd* (2); *Ex parte Leers* (3).

Cooper Willis, Q.C., and *Yate Lee*, for the bank, were not heard.

EARL OF SELBORNE, L.C.:—

I am of opinion that the decision is right, and upon this simple ground, that sect. 39 has no application to a *bonâ fide* security; and we all agree in thinking that this arrangement was a *bonâ fide* one for the purpose of giving the bank a security. If the colour or form of a security were given to a particular transaction, for the purpose of evading the provisions of the *Bankruptcy Act*, it would be a wholly different case. But in the present case a *bonâ fide* security was given under the most natural circumstances; and really the only argument on behalf of the Appellant was, that the nature and the position of the subject-matter of the security was such as practically to nullify the security. The case stands thus: One of the partners in a firm was entitled separately to certain real estate, and he made that real estate a security to the bankers of the firm for the balance which might be from time to time due from the firm on their banking account. Afterwards he desired to sell a portion of that property, and, in order to make a title to the purchaser, it was absolutely necessary for him to obtain the concurrence of the bank in the conveyance. The bank were willing to concur, but upon the terms (in substance) that they should preserve their right to a security as against the purchase-money of the land, which was to be deposited with them under the provisions of a special agreement by deed for that purpose. Accordingly, the money was so deposited, one of the terms of the agreement being that, while the bank had a right to retain the money by way of security for the debt of the firm, they were not to be entitled to

(1) 2 Rose, 197. (2) 2 Rose, 202, n.
(3) 6 Ves. 644.

C. A. 1884

Ex parte CALDICOTT. *In re* HART.

Earl of Selborne, L.C.

apply it in payment of the debt until the expiration of twelve months' notice to the depositor.

It appears to me a fallacy to say that the money so deposited was a debt due from the bank to the father, in the sense that an action could have been brought by him for it, so long as it remained in the hands of the bank, and there was a balance due from the firm to them which the mortgage of the real estate was intended to secure; and I cannot think that the conversion of the security into money, and the deposit with the bank of the money, which continued to be the subject of the security, can make any difference in principle.

It is admitted that, if the money did remain a security, the bank were not obliged to deduct its value before proving their debt against the estate of the firm, because the rule in bankruptcy is, that a valuation or giving up of a security is only necessary when, in the case of a proof by joint creditors, it is a security on the joint estate. Well, this is not a security on the joint estate, and, being in substance, as it is in terms, a security, the principles which are applicable to securities, and not those which apply to mutual credits, appear to me to govern the case.

COTTON, L.J.:—

I agree.

LINDLEY, L.J.:—

So do I.

Solicitors for Trustee: *Crowder, Anstie, & Vizard,* agents for *Thomas Browett, Coventry.*

Solicitors for Bank: *Tucker & Lake,* agents for *Wragge, Evans, & Co. Birmingham.*

W. L. C.

SEARLE *v.* CHOAT.

C. A.
1884
V.-C. B.
Jan. 18.
C. A.
Feb. 11, 12.

[1884 S. 19.]

Practice—Receiver—Action to restrain Receiver appointed in another Action—Judicature Act, 1873, *s.* 24, *sub-ss.* 5, 7.

A person who is prejudiced by the conduct of a receiver appointed in an action by way of equitable execution, ought not without leave of the Court to commence a fresh action to restrain the proceedings of the receiver, even though the act complained of was beyond the scope of the receiver's authority; but ought to make an application for such relief as he is entitled to in the action in which the receiver was appointed.

THE Defendant, *J. P. Choat*, was the Plaintiff in an action brought in the Queen's Bench Division against *R. V. Davies* for a debt due from him, and obtained judgment against him for £211 and costs.

On the 21st of December, 1883, *Choat* obtained an order in that action by way of equitable execution that *R. Alabaster* should be appointed receiver to receive the rents and profits, among other things of certain leasehold houses in which *Davies* was interested; but the appointment was to be without prejudice to the rights of any prior incumbrancers on the said premises who might think proper to take possession of the same by virtue of their respective securities, or, if any prior incumbrancer was in possession, then without prejudice to such possession.

Davies was at that time only entitled to the equity of redemption in these houses, the same having been mortgaged by him on the 5th of September, 1883, to *G. Searle*, the Plaintiff in the present action.

On the 22nd of December, *Searle* gave notice to the tenants of the houses to pay the rents to him.

On the same day, but after *Searle's* notice had been served, *Alabaster*, the receiver, served a notice on the tenants which stated that by an order of the 21st of December he had been appointed receiver in the action of *Choat* v. *Davies*, and required them to pay the rents to him.

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Searle complained to *Choat's* solicitors of this notice, and, not being satisfied with their answer, he brought the present action in the Chancery Division claiming an injunction to restrain *Choat* and *Alabaster* from receiving or intermeddling with the rents of the houses.

The writ was issued on the 2nd of January, 1884, but was served, together with notice of motion for an injunction, on the 8th of January. In the meantime the receiver had withdrawn his notice and served an amended notice on the tenants still claiming the rents.

The motion for an injunction was heard before Vice-Chancellor *Bacon* on the 18th of January, 1884.

Hemming, Q.C., and *J. Beaumont*, for the Plaintiff.

Marten, Q.C., and *McCall*, for the Defendants.

BACON, V.C.:—

I have heard the arguments in this case, but nothing has been advanced to shew me that I can interfere with this notice of motion. It is quite clear that I cannot permit two receivers to be appointed to the same property. Already, by a Court of competent jurisdiction, a receiver has been appointed with certain qualifications which relate to the order. The man in possession is in rightful possession under the terms of the order. If the order is wrong the Court by which it is made should be applied to set it right. If any conduct of the receiver has been erroneous that is the Court to which application should be made. There is no ground upon which I can interfere in any way, either by appointing a receiver or otherwise. The proceeding in my opinion is wholly erroneous, and must be dismissed with costs.

C. A.

From this decision the Plaintiff appealed. The appeal came on for hearing on the 11th of February, 1884.

Hemming, Q.C., and *J. Beaumont*, for the Appellant:—

We ask an injunction to restrain the receiver from interfering with the tenants. His giving them notice prevents their paying

their rents to us. We were in possession before the receiver took any step towards obtaining possession. The Vice-Chancellor went on a misunderstanding of *Russell* v. *East Anglian Railway Company* (1), which has no application to the present case. There the receiver was in possession in accordance with the order, and it was held that whether the order appointing him was right or wrong, nobody could interfere with him without leave of the Court, but it is quite another matter to say that his appointment obliges a person claiming under a title paramount, and who is in possession, to admit his right to possession.

Marten, Q.C., and *McCall*, for the Defendants:—

The notice to the tenants fairly stated the order under which the receiver was appointed, and the receiver had no intention to interfere with the rights of the Plaintiff as mortgagee.

But if the receiver was wrong in what he did, the course taken by the Plaintiff is irregular. Under the old practice the present action would have been irregular. If the receiver exceeded his duties the proper course was to apply to the Court in the suit in which he was appointed: *Smith* v. *Earl of Effingham* (2); *Angel* v. *Smith* (3); *Brooks* v. *Greathed* (4). Under the new practice it is still more clear that the Plaintiff's procedure is wrong, for the intention of the *Judicature Act* is to avoid multiplicity of actions so that the whole matter may be decided in one action: *Judicature Act*, 1873, sect. 24, sub-sect. 5. He ought therefore to have applied in the action in the Queen's Bench Division in which the receiver was appointed.

Hemming, in reply:—

We admit that where the receiver is acting within the order by which he is appointed, any person aggrieved must apply to the Court which appointed him; but where, as in the present case he is not acting within the order, but is exceeding his authority, the proper course of the person injured is to take independent proceedings. We have no complaint to make against the order

(1) 3 Mac. & G. 104.
(2) 2 Beav. 232.
(3) 9 Ves. 335.
(4) 1 Jac. & W. 176.

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appointing the receiver, or of anything which he has done under it. We do complain of acts done by *Alabaster*, which, so far from being authorized, were really forbidden by the order appointing him receiver. *Britton* v. *M'Donnell* (1) and *In re Stack* (2) shew that in such a case it is right to take independent proceedings.

COTTON, L.J.:—

This is an application by way of appeal from a decision of Vice-Chancellor *Bacon*, who refused to grant an injunction to restrain a receiver appointed in an action in the Queen's Bench Division from receiving the rents of certain houses of which the Plaintiff is mortgagee in possession. The Defendant *Choat* is an incumbrancer on the equity of redemption of the same houses. There are two questions to be decided: first, whether what was done by the receiver was right; and, secondly, whether the Plaintiff is right in making this application in the Chancery Division to restrain him.

With respect to the first question, I am of opinion that what was done by the receiver was wrong. He was appointed without prejudice to the rights of prior incumbrancers, and he ought not to have taken possession as against *Searle*. His first notice recites correctly the order appointing him receiver, and he knew that the Plaintiff was a prior incumbrancer, and yet he gives notice to the tenants to pay their rents to him. This notice would entirely prevent any reasonable tenant from paying his rent to *Searle*, who as mortgagee in possession, was entitled to receive it. That being so, I think the proceedings of the receiver were wrong and were in violation of his duty and of the rights of the present Plaintiff.

The second question is, whether the conduct of the Plaintiff in bringing a separate action is the right way of prosecuting his remedy. As I read the judgment of the Vice-Chancellor he proceeded on the ground that the Plaintiff was wrong in making the application before him. The question is whether the Plaintiff was right in bringing this action against the receiver without

(1) 5 Ir. Eq. 275. (2) 13 Ir. Ch. Rep. 213.

the leave of the Court which appointed him. In my opinion, whether he would have been wrong or not before the passing of the *Judicature Acts*, he is clearly wrong now. Under the present practice, if he had applied to the Judge who appointed the receiver he would have obtained all that he is entitled to; the Judge would have directed the receiver either to withdraw or to rectify his notice, so as not to interfere with the first incumbrancer. That was the proper course for the Plaintiff to adopt. I give no opinion as to what would have been the proper course before the *Judicature Acts*, but I think that the Court of Chancery would have obliged the person aggrieved to come to the Court for leave before taking any proceedings. But it is not necessary to go into that, because the whole tenor of the *Judicature Acts* is to require all proceedings as far as possible to be taken in one action, and I am of opinion in the present case that as there was a pending action in the Queen's Bench Division the proper course for the Plaintiff would have been to make his application in that action.

With respect to the costs, we cannot interfere with the order in the Court below, but on the Defendant undertaking to withdraw his notice to the tenants, we think that the justice of the case will be met by giving no costs of the appeal.

LINDLEY, L.J. :—

I am of the same opinion. The question of procedure which has been raised on this appeal is an important one. The receiver was appointed in an action in the Queen's Bench Division, and the order appointing him was right in form: it was made "without prejudice to the rights of any prior incumbrancers." The receiver then served notices upon the tenants, which, having regard to the rights of the Plaintiff, he ought not to have given. That was embarrassing to the Plaintiff, but the Plaintiff might have got all the redress to which he was entitled by an application to the Queen's Bench Division at a small cost, and, having regard to the *Judicature Act*, 1873, s. 24, sub-ss. 5 and 7, it was unnecessary, and therefore improper, to bring a fresh action against the receiver. I do not say that it would never be right

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to allow an action to be brought against a receiver, but no such action can be brought without leave of the Court; and every object of this action might have been obtained by an application in the Queen's Bench Division without any fresh action. Therefore, although the receiver was wrong, the Plaintiff's procedure was wrong also. Under these circumstances I agree that the order should be as stated by the Lord Justice *Cotton*.

Solicitors: *Learoyd & Co.; Bird & Bickersteth.*

M. W.

JAGGER *v.* JAGGER.

KAY, J.

1883

Nov. 21.

[1882 J. 1706.]

Settlement—Trust for Accumulation—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98), *s.* 1 [*Revised Ed. Statutes, vol. iii. p.* 600].

The four different periods beyond which the accumulation of income is unlawful under the 1st section of the *Thellusson Act* are alternative and not cumulative; therefore when one period has been applied and exhausted, a second period cannot be resorted to and applied, in order to extend the time for accumulation.

In applying the Act the Court is bound to consider not merely the events which have happened, but also those which might have happened.

By a post-nuptial settlement the husband assigned all his personal estate to trustees upon trust to apply the income to his own maintenance, and subject thereto, during the joint lives of himself and his wife, and the life of the survivor of them, to apply all or any part of the income for the maintenance of the wife and the children of the marriage, and to accumulate the surplus (if any) so that the accumulations should be added to the principal fund and follow the destination thereof, with liberty for the trustees to resort to the accumulations of any preceding years and apply the same for the maintenance of the wife and children; and after the death of the survivor of the settlor and his wife upon trust, as to both capital and income, for such of their issue as the settlor and his wife by deed jointly, or the survivor by will, should appoint, and in default for the children of the marriage as tenants in common, sons at twenty-one, and daughters at twenty-one or marriage:—

Held, that the only one of the said four periods of the *Thellusson Act* applicable to the case was the first, viz., the life of the settlor; and that the trust for accumulation contained in the settlement was void as from the death of the husband.

BY a post-nuptial indenture of settlement dated the 10th of January, 1878, *Francis Jagger* assigned all his personal estate to trustees upon trusts for conversion and investment, and for application of the income of the trust fund in the first place to his own personal maintenance and support; and subject thereto to stand possessed of the annual income of the trust fund during the life of himself and his wife *Elizabeth* and the survivor of them upon trust to apply the whole or such part as they should think fit for the maintenance of his wife and the children of the marriage, and to "accumulate the surplus (if any) of the said income

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by investing the same and the resulting income thereof in manner aforesaid, to the intent that the accumulations should be added to the principal trust fund and follow the destination thereof, with liberty nevertheless to the trustees at any time or times to resort to the accumulations of any preceding year or years to apply the same for the support, maintenance, and benefit of the wife and the said children, or any one or more of them; "and from and after the death of the survivor of the said *Francis Jagger* and his wife, then, as to as well the capital of the said trust premises as the annual income thereof, upon trust for such one or more of their issue as they should by deed jointly appoint, and in default of such appointment, as the survivor of them should by will or codicil appoint; and in default of and subject to any such appointment, in trust for the children of *Francis Jagger* and his wife, who being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry under that age, and if more than one, in equal shares as tenants in common."

Francis Jagger died in June, 1878, leaving his wife and eight infant children, viz., six sons and two daughters, surviving him.

This action was brought by the trustees against the widow and infant children of the settlor for the administration of the trusts of this settlement, and the question argued upon the further consideration thereof was whether, having regard to sect. 1 of the *Thellusson Act* (39 & 40 Geo. 3, c. 98), the trust for accumulation contained in this settlement was valid to any and what extent (1).

(1) This section is as follows:—"That no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors; or the term of twenty-one years from the death of any such grantor, settlor, devisor or testator; or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mère* at the time of the death of such grantor, devisor, or testator; or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the

Kekewich, Q.C., and *Colt*, for the Plaintiffs:—

The rule usually applied in construing the *Thellusson Act* is to take the longest period allowed thereunder, and if the trust exceeds such period, to hold it void for the excess only: *Longdon* v. *Simpson* (1); so that the period to be taken in this case is twenty-one years from the date of the settlement: *Griffiths* v. *Vere* (2).

It will be contended on the other side, upon the authority of *In re Lady Rosslyn's Trust* (3), that the trust for accumulation after the death of the settlor is void. No reasons, were, however, given by the learned Judge in that case (*Shadwell*, V.C.) for his decision.

[KAY, J.:—The decision must have proceeded upon the ground that of the four periods mentioned in the Act only one could be applied, and that was the lifetime of the settlor.]

The policy of the Act is explained in *Ellis* v. *Maxwell* (4). Its object is to prevent the accumulation of the yearly produce of property for more than twenty-one years. If accumulation for twenty-one years from the date of the settlement is invalid in this case, it is at all events good during the minority of the infants. The accumulations are to be added to the original trust fund, and are made for the sole benefit of the infants, subject only to the power of the trustees to resort to the accumulations of preceding years for the support, maintenance and benefit of the wife and children, and to the power of appointment over it by deed or will, which only affects the proportions in which the children are to take: *Haley* v. *Bannister* (5). If there was no trust for accumulation, then, subject to the trust for the widow's maintenance, the whole trust fund would now belong to the children if they were of age.

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rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

(1) 12 Ves. 295.
(2) 9 Ves. 127.
(3) 16 Sim. 391.
(4) 3 Beav. 587.
(5) 4 Madd. 275.

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Lastly, if none of the other periods mentioned in the section apply, the third appears in terms to meet this very case, for here all the children were living at the date of the settlement.

Stevenson Moore, for the infants, supported the arguments of the Plaintiffs.

Hastings, Q.C., and *Farwell*, for the widow, were not called upon.

KAY, J.:—

I have listened with great pleasure to the arguments which have been addressed to me in this case. Every point which could have been put before the Court has been suggested, and I do not think it necessary to go further or to hear counsel for the Defendant. I must first determine what is the true construction of the voluntary settlement executed by *Francis Jagger*, and afterwards endeavour to apply the provisions of the Act of Parliament to the trust for accumulation, as so construed, in order to see whether it is a valid trust. Now it is clear that in the present case the period of accumulation was to begin from the date of the deed, and it was to continue during the joint lives of *Francis Jagger* and his wife, and during the life of the survivor of them. Then the accumulated fund was to be subject to this trust, that the trustees were always to be at liberty to resort to the accumulated fund arising from the operation of the trust in former years, in order to make up any deficiency in the incomes required in any subsequent year for the support of Mrs. *Jagger* or her children, and subject thereto, the accumulations were to be divided, after the death of the survivor of *Francis Jagger* and his wife, amongst such of their children as they should by deed jointly appoint, or as the survivor of them should appoint, and in default of appointment amongst the children equally. To that settlement I have to apply the provisions of the *Thellusson Act*, and to decide, in the first place, whether the trust for accumulation can be supported to its full extent, and, if not, to what extent it can be supported. Turning to the Act, I find that it contemplates four different periods of

accumulation. The first question then is, which, if any, of these periods applies to the accumulation directed by this settlement. Obviously the first period may apply, because this is an accumulation directed by deed, not by will, and the life of the grantor is therefore a period which may be applicable to the present case. The second period mentioned by the Act is a period of twenty-one years from the death of the grantor. That cannot apply to this case, because here the accumulation is directed to commence, as I have already said in considering the construction of the deed, from the date of the settlement. Then, can I apply either of the other two periods mentioned in the Act? The first of them is "the minority or respective minorities of any person or persons who shall be living or in *ventre sa mère* at the time of" the grantor's death; and in this case it is said that there were infant children of the settlor living at the date of the deed and of the grantor's death; and although the period of the grantor's lifetime has run out, it is said that the trust is still effectual during the lifetime of those infant children under this 3rd clause of the Act. But it is clear that this part of the Act refers only to a direction to accumulate when such accumulation is to begin from the date of the grantor's death; and to say that the accumulation may begin at the date of the settlement, whilst the grantor is living, and continue during his lifetime and afterwards during the minorities of the children, is, in effect, to contend that the Act is cumulative—that is to say, that you may take one of these periods and apply it after a previous one has been exhausted. Now as to the fourth period, the meaning of the Act appears to me to be that if there is an accumulation directed during minority, and the person during whose minority it is directed to be made can at any time say: "But for this accumulation I should be absolutely entitled to the dividends," the accumulation is to be valid during the minority of that person. Can that be said of the infants entitled under the settlement, having regard to the trust for payment of the income for the maintenance of the children and their mother during her life? It has been argued that the question arises not with regard to that which has been applied for their maintenance, but only to the remainder after their maintenance

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has been provided for, and that they are absolutely entitled to the rest. I am thoroughly impressed by the ingenuity of the argument, but one answer to that contention is, that the children cannot say they alone are absolutely entitled subject to the trust for accumulation, because the accumulated fund is itself subject to a direction to apply any part of it that may be needed in a subsequent year to make up a deficiency for the maintenance of their mother and themselves, so that they are not absolutely entitled to the fund. But there is another and entirely different answer to the argument which has been addressed to me on the last two periods contemplated by the Act. If the children living at the date of the settlement had died during the grantor's life-time, and other children had come into existence subsequently who would have been entitled to share in the fund, how is it possible that either of these two alternative periods could be applied? I am of opinion that I am bound to consider, not merely that which has in fact happened, but that which might have happened; and applying the Act in relation to the possibilities of the case, it is clear that neither of these periods which are limited by the minorities of living persons could apply to the trust which I have to consider. I am therefore of opinion that the only one of these four periods which applies to the trust for accumulation contained in this deed is the first, that of the life of the grantor, the same which was held to be applicable in *Lady Rosslyn's Case* (1), and I must make a declaration accordingly.

Solicitors: *Cooke & Jonas*, agents for *Chandler, Shrewsbury; Pritchard, Englefield, & Co.*, agents for *Brabner & Court, Liverpool.*

(1) 16 Sim. 391.

W. W. K.

HYETT *v.* MEKIN.

KAY, J
1884
Jan. 14.

[1875 H. 29.]

Will—Power of Sale in Trustees—Order for Sale—Conversion.

An absolute order for sale made within the jurisdiction of the Court in an administration suit operates as a conversion from the date of the order and before any sale has taken place.

BENJAMIN ANTHONY HYETT, who died on the 18th of February, 1872, by his will made on the 14th of that month, after appointing two executors and trustees, and making certain specific devises and bequests, gave all the residue of his real and personal estate to his executors, their heirs, executors, administrators, and assigns, upon trust after payment of his debts, funeral, and testamentary expenses, to pay an annuity to his wife for her life, and subject to such payments to stand possessed of the residue in trust for all his children equally, sons who should attain the age of twenty-one years, and daughters, for their separate use, who should attain that age or marry, and the testator then said, "I give to my said trustees a power of sale over all or any part of the real and personal estate hereinbefore devised and bequeathed to them, and I declare that my residuary real estate so bequeathed in trust aforesaid shall for the purposes of transmission be impressed with the quality of personal estate from the time of my decease."

In February, 1875, a suit was instituted by the eldest son of the testator for the administration of the estate, and on the 22nd of January, 1876, a decree was made by the late Vice-Chancellor Sir *Charles Hall*, and it was, *inter alia*, ordered that the testator's unsold residuary real estate be sold with the approbation of the Judge.

The testator left his wife and five children him surviving. The Plaintiff, when the suit was instituted, was an infant, but he attained the age of twenty-one years in July, 1875, and before the decree was made. The youngest son died in June, 1878, an infant. The other three children attained the age of twenty-one years.

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In August, 1878, the Chief Clerk certified that *James Hyett*, the second son, and the other two children, daughters, had, after notice to them of the decree, and under orders made in January, 1877, and July, 1878, giving them liberty to attend, attended by their solicitors the proceedings in the cause before him.

James Hyett, who was born in March, 1857, attained the age of twenty-one years in March, 1878, and died in March, 1880, intestate. Letters of administration to his estate were granted to one of his sisters in December, 1883.

Prior to the date of the certificate, *i.e.* in January, 1873, the executors sold one of the freehold houses for £700. No claim had, it was certified, been brought in for any debt.

In February, 1879, the rents and profits of the residuary real estate in the hands of the receiver, who was appointed in August, 1876, were paid into Court to the credit of the cause, and in January, 1883, an order was made directing payment to the three surviving children of a sum, which represented such rents and profits, on account of their respective shares.

In July, 1883, the Chief Clerk certified that in pursuance of the decree the unsold residuary real estate had been offered for sale in seven lots; that six lots were sold, and that one lot was not sold. No part of the estate had been appropriated to meet the claims of the annuitant who was still living.

The cause now came on to be heard upon further consideration.

The main question was, whether the share of *James Hyett* of the residuary real estate belonged to his heir-at-law or next of kin.

W. Pearson, Q.C., and *Archibald Brown*, for the Plaintiff:—

The questions are whether there was a conversion by the testator's will, and if there was not, whether there was a conversion by the decree of the Court. All the children had an interest in the residuary real estate. The power given to the trustees to sell was merely discretionary, and did not actually convert that which was real estate in the children into personal estate. The power until it was positively exercised did not operate. The testator had no power to say to the devisees that the estate should devolve as personal. As all the debts had

been paid, no decree for sale for payment of them was required. It is admitted that if the Court rightfully in the exercise of its jurisdiction, ordered the estate to be sold, and it was sold, it would have been a conversion. When the suit was commenced, the Plaintiff was an infant, but he attained twenty-one before the decree was made. At that time the Court could make only the ordinary decree for administration, and it could not go beyond that. It had not power to order a sale of the estate, it not being necessary to raise money for the payment of debts. What was done was not according to the usual practice. There being no necessity for a sale, the Court in the presence of one beneficiary, and in the absence of all the others, exercised the discretionary power which was given to the trustees, and was not entitled to do that in the absence of those children. *James Hyett* did not elect. There must be reference to some act on his part, but there was none; he found the decree made for sale, and if he had done anything in regard to it for the purpose of a sale he might have been bound by it; but nothing was done under the direction to carry the sale into effect during the time that he lived. The estate was not sold till three years after his death, and part is not yet sold. It is submitted that neither upon the construction of the will, nor by reason of the decree, having regard to the circumstances of the case, has there been any conversion.

Chubb, for the other children:—

All the children were to share in the residuary real estate. There was an absolute gift to the trustees to whom the testator gave a power of sale coupled with a declaration which operated as a trust for sale and as a conversion in law, and *James Hyett* took his share as personal estate. It is submitted that the addition of the latter words had precisely the same effect as saying that the children were to take the proceeds of sale, or if they took the estate they were to take it as personal estate. Had the testator expressed himself in such a manner as to enable the Court to carry out his intention? It is submitted that he did so. Where the Court has jurisdiction to order a sale, as it had here, for the purpose of paying the debts, and in the exercise of its

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jurisdiction does order a sale that has the effect of making a conversion in equity, and a volunteer claiming under *James Hyett* cannot be heard to say that such a conversion was not absolute for all purposes of devolution from him.

Rawlinson, for the trustees.

During the argument the following cases were referred to: *Grieveson* v. *Kirsopp* (1); *Cooke* v. *Dealey* (2); *In re Barker* (3); and the cases of *Roberts* v. *Gordon* (4); *Arnold* v. *Dixon* (5); *Foster* v. *Foster* (6). *Steed* v. *Preece* (7), and *Wallace* v. *Greenwood* (8), were referred to by Mr. Justice *Kay*.

W. Pearson, in reply:—

All the debts of the testator had been paid, and there was no necessity for an order to sell for payment of them. The decisions in cases which have been referred to, amount to this, that if judgment for conversion has been rightfully made, and if there has been an actual conversion, then the property is taken in the state and condition in which it is found, but if there has been no actual conversion at the time of death, then there has been no conversion in law. *James Hyett* died in March, 1880, and the estate was not actually converted until 1883, and then only as to a part of it.

KAY, J.:—

The first question raised in this case, is whether by the will of the testator in the action, his residuary real estate was converted in the view of a Court of Equity into personal estate. [His Lordship read the language of the will above set forth and continued:—] Now it has not been and could not be contended that a mere direction of this kind can alter the devolution of real estate from the devisee to the heir-at-law of such devisee after the testator's death; but the argument has been that, coupling the direction with the power of sale given to the trustees which

(1) 2 Keen, 653.
(2) 22 Beav. 196.
(3) 17 Ch. D. 241.
(4) 6 Ch. D. 531.
(5) Law Rep. 19 Eq. 113.
(6) 1 Ch. D. 588.
(7) Law Rep. 18 Eq. 192.
(8) 16 Ch. D. 362.

immediately precedes it, the power must be read as a power in the nature of a trust, if not as an actual and immediate trust for sale, and therefore that the will should be read, taking the clauses together, as if it contained an absolute trust for sale. No authority in support of that interpretation has been cited, and I do not think I am at liberty to adopt it. Nothing is given but a power. There is no actual and imperative conversion directed by the testator, and I must treat his language literally as meaning to give to the trustees not an imperative direction to sell, but a power to sell in case they should think fit to do so. Such a direction does not amount to a conversion of the real estate by the will.

The next question is, has there been a conversion by reason of the events which have happened. The real estate has not in fact been all sold. Some of it has and some of it has not been. The suit was instituted by one of the testator's children—a residuary legatee, against the trustees for administration by the Court, and on the 22nd of January, 1876, a decree for that purpose was made. It contained a direction that the real estate be sold with the approbation of the Judge. It was an imperative and positive order for sale. The Chief Clerk's certificate afterwards made, shews that no claim was brought in for payment of any debt, therefore I assume that a sale was not wanted for the purpose of raising money to pay debts. That indeed, I think, appears on the face of the decree, because the direction for sale is not contingent, as is often the case, upon the insufficiency of the personal estate for payment of debts, but it is an absolute order for sale. The Plaintiff attained the age of twenty-one years before the decree was made, but his brother *James*, another of the residuary legatees, who was not actually a party to the action, did not attain the age of twenty-one years until the 4th of March, 1878, *i.e.* after the date of the decree. In July of that year he obtained liberty to attend the proceedings in the cause, and it is therefore evident that he was served with notice of the decree under, as I presume, the statute 15 & 16 Vict. c. 86.

He did attend the proceedings, and he afterwards died in March, 1880. At his death part of the residuary real estate remained unsold, and the question has arisen whether as between

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his real and personal representatives that residuary real estate, though not actually sold, should or should not be treated as personal estate in the view of a Court of Equity.

A good many authorities have been referred to, and they require some consideration. In *Cooke* v. *Dealey* (1) it was decided, where real estate was sold in an administration suit to which the devisee was a party, and after payment of debts there remained in Court a surplus of proceeds of sale, that the surplus in the character of real estate passed to the heir of the devisee. In *Steed* v. *Preece* (2) the late Master of the Rolls (3) considered that case, and also a previous case of *Jermy* v. *Preston* (4), decided by Vice-Chancellor *Shadwell*, and he said that "the judgment in *Cooke* v. *Dealey* is based on a general principle assumed to have been laid down in *Ackroyd* v. *Smithson* (5), viz., that the conversion of real estate into personalty only takes effect to the extent of the object required, and that beyond this the rights of the parties remain the same as if no conversion had taken place. But all that *Ackroyd* v. *Smithson* decided was that a conversion directed by a testator is a conversion only for the purposes of the will, and that all that is not wanted for those purposes must go to the person who would have been entitled but for the will. It does not decide that if the Court or a trustee sell more than is necessary, there is any equity to reconvert the surplus for the benefit of the heir-at-law of the person entitled at the time of the sale." And he went on to say, "It is not necessary to decide that question now; but it seems to me that if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow: and that there is no equity in favour of the heir or any one else to take the property in any other form than that in which it is found: and that the sole question to be considered in all these cases is, whether the estate has been rightfully or wrongfully sold." In the case of *Steed* v. *Preece* a sale was ordered by the decree. The sale was actually made, and the purchase-money paid into Court. The infant's share was carried to a separate account. The infant

(1) 22 Beav. 196.
(2) Law Rep. 18 Eq. 192.
(3) Law Rep. 18 Eq. 196, 197.
(4) 13 Sim. 356.
(5) 1 Bro. C. C. 503.

afterwards died without having attained twenty-one, and it was held that the fund in Court belonged to his legal personal representative. The Master of the Rolls decided that there was an actual conversion for all purposes. In *Arnold* v. *Dixon* (1) the late Vice-Chancellor *Hall* held, that where in an administration suit asking for partition of real estate the Court directed a sale, but before it was effected one of the parties interested in the real estate died, the estate was sufficiently converted, and the estate having been sold, the share of the deceased beneficiary passed to his legal personal representative. In that case there had not been any sale, but the Vice-Chancellor considered that in so deciding he was following the case of *Steed* v. *Preece* (2). It does not appear whether the person who had died was an infant or not, but the materiality of the case is that the Vice-Chancellor was of opinion that a mere order for sale in an administration suit was a sufficient conversion.

The report of that case is short, and it does not appear whether the Court assumed power to sell for the purposes of administration simply, or whether it was a sale under the *Partition Act*, 1868 (31 & 32 Vict. c. 40). In *Foster* v. *Foster* (3) a sale was ordered under the *Partition Act*, 1868. The suit was for partition. There were infants interested, and it was held that by force of sect. 8 of that Act, incorporating the provisions of sects. 23 to 25 of the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120), the proceeds of sale must be treated as realty, or, in the language of the Master of the Rolls (4) in his judgment, there was an equity for reconversion by reason of the incorporation of the sections which I have referred to, which directed re-investment in land. In *Wallace* v. *Greenwood* (5) a partition action under sect. 6 of the *Partition Act*, 1876 (39 & 40 Vict. c. 17), a request for sale on the part of a married woman was made, and a sale was directed, and the Master of the Rolls held that, under sect. 6 of that Act, the mere direction for a sale operated as a conversion. There is another case to which I must refer, viz., *In re Barker* (6), where the question again arose in a

(1) Law Rep. 19 Eq. 113.
(2) Ibid. 18 Eq. 192.
(3) 1 Ch. D. 588.
(4) 1 Ch. D. 590.
(5) 16 Ch. D. 362.
(6) 17 Ch. D. 241, 244.

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partition suit, in which there had been an actual sale. A share of the real estate belonged to a lunatic who had died intestate, and it was held that the money retained the character of real estate and passed to the lunatic's heir-at-law. Apparently for the same reason which influenced the Master of the Rolls in his decision in *Foster* v. *Foster* (1), Lord Justice *Cotton* said that the Court had to construe the 8th section of the *Partition Act*, 1868, and that introduced into that Act the 23rd section of the *Settled Estates Act*, and that there was in effect by that incorporation "a direction in the *Partition Act*, 1868, that the moneys arising from sales under that Act are either to be invested in land or applied in paying off incumbrances on land settled to the same uses or to be paid to some person becoming absolutely entitled." Accordingly it was held that there was no conversion. It seems to me that the result of these authorities is clearly this: that if in an action for administration of an estate the Court in the exercise of its undoubted jurisdiction makes an order for the sale of the estate, the order for sale will amount in itself to a conversion. That was so decided by the late Vice-Chancellor *Hall*, in the case of *Arnold* v. *Dixon* (2), and in the case of *Wallace* v. *Greenwood* the late Master of the Rolls said (3): "Where the Court has power to sell an infant's real estate, and orders it to be sold, the order operates as a conversion, and the estate then becomes personalty." I respectfully say that I agree with that *dictum* of the late Master of the Rolls. The question, therefore, in the present case, is reduced simply to this: Had the Court jurisdiction to make the order in January, 1876, for sale of the estate? That it had I have no doubt whatever, because the will, at any rate, gave power to the trustees to sell all or any part of the estate, and in an action for the administration of the estate, to which the trustees were parties, the Court ordered a sale of the whole, obviously not for the payment of debts, but under the power of sale given to the trustees. I have no doubt that the order was made with complete jurisdiction in the Court to make it, and the order, therefore, according to the language, which I have read, of the late Master of the Rolls, operated as a conversion. The result is

(1) 1 Ch. D. 588. (2) Law Rep. 19 Eq. 113.
(3) 16 Ch. D. 365.

that the share of *James Hyett* in the residuary real estate, as well in that which has not been sold, as in that which has been sold, belongs to his next of kin, and there must be a declaration to that effect.

Solicitors: *M. B. King; Merediths, Roberts, & Mills*, agents for *Ticehurst & Sons, Cheltenham.*

T. F. M.

In re JUDKIN'S TRUSTS.

Will—Contingent deferred Legacy payable out of Residue—Rest of Residue payable first—Gift of "rest" of Residuary Estate—Severance for Convenience of Estate—Interim Income—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

A testator by will, after giving his real and personal estate to trustees upon trust for sale and conversion and payment of debts and legacies, directed the trustees to stand possessed of the residue of the trust moneys upon trust, in the first place, to pay thereout £1500 to be equally divided between such of six legatees whom he named as should be alive at the death of *A. B.*; such shares to be paid to them respectively on attaining twenty-one or marriage. "And as to the rest of his residuary estate" upon trust for *X. Y.* *A. B.* and the six legatees all survived the testator and were still living.

The trustees having set apart and invested £1500 to meet the legacy, *X. Y.*, the six legatees, and the next of kin of the testator, all claimed to be entitled to the income thereof during the life of *A. B.*:—

Held, that such income passed under the gift of the rest of the testator's residuary estate, and that *X. Y.* was entitled thereto during the life of *A. B.*

Where a contingent deferred legacy has been severed from the general estate of a testator, such severance will not entitle the legatee to interim interest thereon unless the severance has been necessitated by something connected with the legacy itself.

Trustees cannot, under sect. 43 of the *Conveyancing Act*, 1881, apply the income of an infant's contingent legacy for the benefit of the infant, unless the income will go along with the capital of the legacy if and when such capital vests.

PETITION.

C. H. E. Judkins, who died in October, 1878, by his will, after a specific devise and divers specific and pecuniary legacies, devised and bequeathed all his real and personal estate, except what he

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otherwise disposed of by his will or any codicil thereto, to trustees, their heirs, executors, and administrators respectively, upon trust for sale and conversion into money, and out of the moneys to be produced thereby and his ready money to pay his debts and funeral and testamentary expenses and legacies, and to "stand possessed of the residue of the same moneys upon trust in the first place thereout to pay the sum of £1500 to be equally divided between and amongst such of the undermentioned six younger children of my late friend *F. S. Hull* who shall be alive at the decease of my grandson *C. J. Anderson*, share and share alike, that is to say, *Nina Hull*, *Ernest Hull*, *Alfred Hull*, *Winifred Hull*, *Janet Hull*, and *Reginald Hull*, such shares to be paid to them respectively on attaining the age of twenty-one years or marriage, which shall first happen. And as to the rest and residue of my residuary estate in trust for my sister *Eliza Ann Morison* for her separate use."

The debts and funeral and testamentary expenses and pecuniary legacies of the testator had all been paid or provided for, and the sum of £1500 had been set apart to answer the said legacy to the six younger children of *F. S. Hull*. But as the testator's grandson, *C. J. Anderson*, was still living, *Eliza Ann Morison*, the testator's residuary legatee, claimed to be entitled to the whole income of this £1500 during the life of such grandson, who was now an infant of nineteen years of age. The six younger children on the other hand contended that upon attaining the age of twenty-one, or marrying, they respectively took vested interests in the £1500, or at any rate that the income of that sum should be accumulated for their benefit during the period of twenty-one years from the death of the testator, if *C. J. Anderson* should so long live. The next of kin of the testator also claimed to be entitled to the income of the £1500 during the life of *C. J. Anderson*. Three of the children of *F. S. Hull* had attained the age of twenty-one and the remaining three were infants and unmarried.

Under these circumstances the trustees paid the sum of £1701 13*s.* 4*d.*, being the amount of the £1500, together with £201 13*s.* 4*d.*, representing interest which had accrued while the principal sum had been invested on mortgage, into Court

under the *Trustee Relief Act*, and this sum having been since invested in consols, *Eliza Ann Morison* now petitioned for the payment out to her of so much of the Consols as represented interest, and for an order that the dividends upon the principal might be paid to her during the life of *C. J. Anderson*.

Christopher James, for the Petitioner.

E. S. Ford, for the children of *F. S. Hull* :—

The legacy of £1500 has been set apart and severed from the rest of the testator's estate, and accordingly carries interest, which will go with the *corpus* to such of the children of *F. S. Hull* as shall become entitled to share therein: *Theobald* on Wills (1); *Dundas* v. *Wolfe Murray* (2).

Under sect. 43 of the *Conveyancing Act* of 1881, the trustees might apply the whole income of this fund, including any accumulations existing for the time being, for or towards the maintenance, education, or benefit of these children. That enactment was intended to meet the difficulty arising from the construction put upon the 26th section of 23 & 24 Vict. c. 145 by the case of *In re George* (3), which decided that the income applicable towards the maintenance of an infant entitled to a contingent legacy must be income to which the infant will be entitled if he becomes entitled to the legacy.

Tyssen, for the next of kin of the testator :—

The gift under which the Petitioner claims the income of this £1500 is a gift of the rest and residue of the residuary estate after the £1500 has been taken out of it, and it is not, strictly speaking, a residuary gift at all. It is in fact a gift of what remains of a residue after a sum of money has been taken out of it, and according to the authorities it is in the nature of a gift of an aliquot share of such residue, and does not include the interest on the sum already given, which interest is therefore undisposed of and goes to the next of kin: *Lloyd* v. *Lloyd* (4); *Simmons* v. *Rudall* (5).

(1) 2nd Ed. p. 141.
(2) 1 H. & M. 425.
(3) 5 Ch. D. 837.
(4) 4 Beav. 231.
(5) 1 Sim. (N. S.) 115.

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[KAY, J.:—The decision in *Lloyd* v. *Lloyd* (1) was upon the authority of a previous case upon the construction of another will, an unsafe method of decision, which I should only adopt where the terms of the gift were identical.]

C. James, in reply:—

The severance of a legacy from the general estate will not have the effect of causing the legacy to carry interest in favour of the legatee, unless such severance is rendered necessary by the nature or for the purposes of the legacy itself: *Festing* v. *Allen* (2). Here it is merely the accident of the residue becoming payable before the legacy which has caused the severance.

[KAY, J.:—Have you examined *Acherley* v. *Wheeler* (3)?]

James:—That case was commented upon in *Festing* v. *Allen*, and there were special circumstances in it. The principle of *Festing* v. *Allen* on this point was adopted with approval in *Dundas* v. *Wolfe Murray* (4). *Lloyd* v. *Lloyd* and *Simmons* v. *Rudall* (5) are both cases of undisposed of *corpus* forming a portion of an aliquot share of residue, and do not apply to the present case, where, assuming the legacy not to carry interest, what is taken out of the residue is a fixed sum payable at a future time.

In the course of the arguments *Page* v. *Leapingwell* (6) and *Williams* v. *Haythorne* (7) were also referred to.

KAY, J.:—

It is clear that the children of *F. S. Hull* did not take vested interests in this sum of £1500, for it is only such of them "who shall be alive at the decease of the testator's grandson," who are to share therein, and none of them have as yet survived him. It is also clear that those children are not persons as to whom the testator was in any sense *in loco parentis*, so as to entitle them on that ground to maintenance out of the income, and the question is, who is entitled to the income of the fund until it becomes

(1) 4 Beav. 431.
(2) 5 Hare, 573.
(3) 1 P. Wms. 783.
(4) 1 H. & M. 425.
(5) 1 Sim. (N.S.) 115.
(6) 18 Ves. 463.
(7) Law Rep. 6 Ch. 782.

vested. It is argued that this fund even if not vested has been set apart from the rest of the testator's estate, and must therefore be held to carry interest, which will go with the capital to the persons who shall become entitled to that capital. The doctrine on this head is well defined by Vice-Chancellor *Wigram* in the case of *Festing* v. *Allen*, who there says (1): "Now although a direction to sever a legacy from the bulk of an estate has often been relied upon as an argument favourable to a claim of interest upon a deferred legacy, it is impossible to hold that the mere necessity of making such a severance in some events only (as in the case of the residue becoming payable before the legacy itself is payable, or other cause unconnected with the legacy itself) can have the effect of giving interest upon a deferred legacy before it becomes payable." This applies exactly to the case before me. Here the grandson might die, and the shares in this fund might become vested before the ultimate residue became payable to *Eliza Ann Morison*. So that it is not a case in which there is any necessity for severance connected with the legacy itself, and that necessity arises from the accidental circumstance that the ultimate residue becomes payable before the legacy.

The case therefore is not within the authorities which decide that a legacy carries interest by reason of its severance, and accordingly this legacy does not carry interest either because it was vested or because it was severed.

But then comes this further question. There are two Acts of Parliament which empower trustees to apply the income of an infant's contingent legacy for or towards his maintenance and education. The first is *Lord Cranworth's Act*, 23 & 24 Vict. c. 145. But in *In re George* (2) it was held that the enactment in sect. 26 of that Act (by which the power was given) did not mean that trustees should so deal with a contingent legacy which did not carry interest, but that as what was applicable under the section was "income to which such infant may be entitled in respect of such property," it must be income to which the infant "will be entitled if he become entitled to the legacy." A later Act was, however, passed in larger language to meet that difficulty. The *Conveyancing and Law of Property Act*, 1881, by sect. 43 provides

(1) 5 Hare, 575, 577.

(2) 5 Ch. D. 837.

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that: "Where any property is held by trustees in trust for an infant. . . . whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age;" trustees may apply for the infant's maintenance, education, or benefit "the income of that property or any part thereof." This is an extension of the power given by sect. 26 of *Lord Cranworth's Act*, and, according to the learned note of Mr. *Wolstenholme* upon the section (see *Conveyancing Acts* by *Wolstenholme* and *Turner* (1), which appears to be an accurate statement of its effect, it replaces sect. 26 of *Lord Cranworth's Act*, and is so worded as to avoid the question raised in the case of *In re George* (2). The note continues: "In the case of a simple pecuniary legacy to an infant contingent on his attaining twenty-one, and carrying interest in the meantime, the executors being bound to set it apart and accumulate the income, it is conceived that in the absence of any direction to the contrary the effect of this section is that if the infant dies under twenty-one the residuary legatee takes only the accumulations representing the unapplied part of the income, see *In re Cotton* (3). On the other hand if no interest is payable on the legacy till the infant attains twenty-one, there is no income to which the section can apply, and the residuary legatee takes the income of the residue without deduction till the legacy becomes vested." The reason for the result in the first case appears plain upon the face of the section, for the second clause of it (sub-sect. 2) contains a direction that the trustees shall accumulate the residue of the income, but so that they "may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year." This was no doubt intended to enable them to meet any increased expense as the infant became older, and thus the section gives to the trustees extraordinary powers of dealing with the interest upon an infant's contingent legacy, so that they can take away from the residuary legatee so much of the interest or accumulations as might be necessary for the infant's maintenance, education, or benefit.

(1) 3rd Ed. p. 95. (2) 5 Ch. D. 837.
(3) 1 Ch. D. 232.

But the whole section only applies to property to which an infant is entitled either absolutely or contingently on attaining twenty-one, or "on the occurrence of an event before his attaining that age." These last words no doubt point, amongst other events, to the ordinary case of a gift on attaining the age of twenty-one years or marrying under that age, which shall first happen. It is otherwise where, as in this case, an infant is unable to predicate of himself that he will be so entitled, for it is evident that any one, or all, of these six children who attain twenty-one may die before the testator's grandson, and thus never become entitled at all. In such a case neither the trustees nor the Court can apply income for maintenance, and there is no obligation to accumulate.

The income, therefore, is payable either to the residuary legatee or to the next of kin of the testator, and the question to which of them depends upon whether it was or was not disposed of by the will.

On behalf of the next of kin it is argued that as the gift under which the Petitioner claims is of part a residue, the rest of the residuary estate must be treated as an aliquot share, and the income of the £1500 legacy is undisposed of and lapses. Two cases were cited in support of this view. In one of them, *Simmons* v. *Rudall* (1), the testator gave the residue of his real and personal estate to trustees in trust for *Isabella Armstrong* for life, with remainder upon trust as to one fourth for such persons as she should appoint by will, and upon further trust to divide, convey, assign and transfer all the rest, residue and remainder of the trust property to other persons. *Isabella Armstrong* died intestate, and Lord *Cranworth*, V.C., held that the one fourth subject to her power of appointment was undisposed of; his reason for doing so being that he read the "rest, residue and remainder" of the trust property as meaning all the original residue except that one-fourth, or in other words three-fourths of the original residue. That case, however, in which an aliquot part of the residue was undisposed of, does not apply to the present.

In the other case, *Lloyd* v. *Lloyd* (2), a gift of £500 out of an

(1) 1 Sim. (N. S.) 115. (2) 4 Beav. 231.

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aliquot share of a residue failed, and the Court, conceiving itself bound to follow a decision of Sir *Thomas Plumer* in *Skrymsher* v. *Northcote* (1), held that a legacy given out of a share of a residue was a mere portion or subdivision of such share, and belonged to the next of kin as undisposed of.

I confess that I should myself have been inclined to decide the case the other way. But at all events it does not apply to the present case.

Accordingly I hold that the income of the £1500 during the life of the grandson of the testator passed under the gift of the rest and residue of the testator's residuary estate, and is payable to the Petitioner as his residuary legatee.

Solicitors: *John Wilkinson*, for *Wright, Becket & Co., Liverpool; Gregory, Rowcliffes, & Co.*, for *Stone, Fletcher & Hull, Liverpool; Longbourne, Longbourne & Stevens.*

W. W. K.

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Feb. 9.

KEITH *v.* BUTCHER.

[1882 K. 521.]

Practice—Action for Foreclosure—Judgment, not drawn up and entered—Discovery of Puisne Mortgagees—Rules of Supreme Court, 1883, *Order* XVI., *r.* 11—*Leave to amend by adding Defendants.*

Where judgment in a foreclosure action had been pronounced, but had not been drawn up and entered, and it was discovered that there were puisne mortgagees, leave was given under Rules of Supreme Court, 1883, Order XVI., rule 11, to amend the writ and statement of claim by making the puisne mortgagees defendants.

THIS was an action for foreclosure against the mortgagor. In November, 1882, judgment was pronounced, but it had not been drawn up and entered. After that time it was discovered that there were incumbrancers subsequent to the Plaintiff, and consequently the judgment was not perfect as against them.

Freeman, for the Plaintiff, now applied under Rules of Supreme Court, 1883, Order XVI., rule 11, for leave, notwithstanding the

(1) 1 Sw. 566.

judgment, to amend the writ and statement of claim by making the subsequent incumbrancers Defendants. He referred to the case of *Attorney-General* v. *Corporation of Birmingham* (1), where it was held that after final decree (Order XVI., rule 13, Rules of Court, 1875) such an amendment could not be made, and said the distinction was that the judgment in this case had not been drawn up and entered, and the application now was to have the action restored to the Cause Book, and marked "part heard," and for leave to amend in the manner mentioned. In due course the Defendants would enter appearance, and when that was done, final judgment could be pronounced.

KAY, J., made the order asked for.

Solicitors: *Blake & Heseltine.*

(1) 15 Ch. D. 423.

T. F. M.

CHITTY, J.

1883

Nov. 20, 21, 26.

In re DENHAM & CO.

Company—Winding-up—Payment of Dividend out of Capital—Director—Fraud—Negligence—Misfeasance—Breach of Trust—Innocent Director—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 165 [*Revised Ed. Statutes vol. xiv. p.* 238].

An innocent director of a company is not liable for the fraud of his co-directors in issuing to the shareholders false and fraudulent reports and balance sheets, if the books and accounts of the company have been kept and audited by duly appointed and responsible officers, and he has no ground for suspecting fraud. Consequently, if such a director has received, together with the other shareholders, dividends declared and paid in pursuance of such reports and balance sheets, such dividends having been, in fact, payments out of capital, he cannot be called upon, under sect. 165 of the *Companies Act*, 1862, to repay the dividends so paid, nor even the dividends received by himself.

A director is not bound to examine entries in any of the company's books; nor is the doctrine of constructive notice to be so extended as to impute to him a knowledge of the contents of the books.

The articles of association of a company vested in *D.*, the vendor to the company and its chairman, the "supreme control" of its management and business; also power "to the exclusion of general meetings and the board" to determine the amount of dividend, and, generally, power to exercise any of the authorities thereby conferred on the general meetings and boards of directors, and in doing so to "supersede the authority of general meetings and boards." The articles then, "subject and without prejudice to the authorities thereby given to" *D.*, vested the general conduct and management of the business of the company in the board of directors, and required them to keep and render proper accounts, reports, and balance sheets. The articles also prohibited the payment of dividends except out of profits. The company had a regular book-keeper and duly appointed auditors. During a period of four years printed annual reports, with balance sheets annexed, were issued to the shareholders purporting to shew profits each year available for a 15 per cent. dividend, which was declared and paid accordingly. Each report was headed with the names of the four directors of the company including *D.*, the chairman, and ended with the words, "By order of the directors—*D.*, chairman"; the balance sheets being signed as approved by the auditors. *C.* was one of the directors named at the head of the reports, but he never attended any of the board meetings or took any actual part in the preparation or issue of the reports and balance sheets, and during the four years he only occasionally attended the company's general meetings, at one of which, at *D.*'s request, he formally moved the resolution declaring the 15 per cent. dividend for that year.

On the company having subsequently been ordered to be wound up, it was found that the dividends for the four years had been paid out of capital

and not out of profits, and that in order to shew profits available for the 15 per cent. dividend the accounts had been fraudulently manipulated by *D.* and the book-keeper, though without the knowledge of *C.*, who had no grounds for suspecting misconduct on the part of any of the officers of the company. A summons having been taken out under sect. 165 of the *Companies Act*, 1862, by certain creditors of the company to compel *C.* to repay the amount of dividends so paid out of capital:—

Held, that *C.* was not personally responsible for the fraudulent reports and balance sheets and the dividends paid under them, the words "By order of the directors" at the foot of the reports not being alone sufficient to fix him with individual liability; and that—having regard to the powers by the articles vested in *D.*, and to the fact that the books had been kept and audited by duly authorized officers, and that *C.* had had no reason to suspect any misconduct—*C.* had not been guilty of such negligence or abnegation of duty as to render himself liable to repay the whole amount of capital paid away as dividends to himself and the other shareholders, nor even the amount received by himself alone as a shareholder, nor the single dividend for which he had formally moved the resolution.

ADJOURNED SUMMONSES.

These were two summonses taken out under sect. 165 of the *Companies Act*, 1862, by certain creditors of *Charles Denham & Co., Limited*, a company now in liquidation, for the purpose of rendering four directors of the company liable for a breach of trust in respect of large sums of money paid by way of dividend to the shareholders of the company, including themselves, out of capital.

The company was incorporated in January, 1873, with a capital of £60,000 in 12,000 shares of £5 each. Its objects, as described in the memorandum of association, were, shortly, the acquisition of certain freehold and leasehold estates and stone quarries situate in the parishes of *Halifax* and *Bradford*, in the county of *York*, and belonging to a Mr. *Charles Horsfall Denham*; the acquisition of the business of a stone merchant, carried on by *Denham* under the name of "*Charles Denham*," in the parishes of *Halifax*, *Bradford*, and *Goole*, in the West Riding of *Yorkshire*; and, generally, the carrying on of the business of quarrymen and stone merchants.

The articles of association contained, by way of introduction, certain recitals stating *Denham's* title to the property proposed to be acquired by the company, and that *Denham* was to receive his purchase-money in partly paid-up shares and cash; also that

CHITTY, J. 1883 *In re* DENHAM & Co.

Denham "shall be, and while a shareholder shall continue to be, the chairman of the board of directors, and shall retain the supreme control in the management of the company and the business thereof, giving thereto such amount of care and attention as he shall consider the interests of the business require," and should, so long as he was chairman, receive the remuneration of £600 per annum; and that it was upon the above basis that the company was founded.

The articles then contained the following provisions:—

"Art. 6. The business shall be carried on by and under the management of the board, but subject to the control of general meetings in accordance with these presents."

"Art. 15. The number of directors, not to be more than five or fewer than three, shall from time to time be determined by the company in general meeting, but until any other number is so determined there shall be three directors, of whom the said *Charles Horsfall Denham* shall be one. The quorum at any meeting of directors shall be two, and in case of equality of votes the chairman of any meeting shall have a casting vote in addition to his original vote."

Art. 16. Messrs. *Charles Horsfall Denham*, *Lewis Thomas Crook*, and *George Taylor* to be the first directors of the company.

Art. 19. The first directors, other than *Denham*, to retire in rotation; "but the said *C. H. Denham* shall not be subject to retirement or removal."

Art. 24. *Denham* to be chairman of the board until he resigned or ceased to be a shareholder, and not to be removable or subject to retirement in rotation.

"Art. 25. Every resolution in writing under the hand of the said *C. H. Denham*, while such chairman as aforesaid, shall be valid and as binding on the company as a resolution of a general meeting or a resolution of the board.

"Art. 26. The said *C. H. Denham*, as such chairman, may affix the company's seal to any resolution in writing under his hand, so as to make it the act of the company.

"Art. 27. In addition to the other authorities expressly and by implication conferred by these presents on the said *C. H. Denham*, while acting as such chairman as aforesaid, he shall

have, to the exclusion of general meetings and the board, full authority to determine the following matters :" (*a*), admission of shareholders; (*b*), selection of directors; (*c*), their remuneration; "(*d*), what resolutions shall be proposed to general meetings and board respectively;" (*e*), amounts to be carried to the reserved fund and depreciation fund respectively; "(*f*), what shall be the amounts of dividend, and when they shall be declared and paid;" (*g*), what businesses should be undertaken or given up by the company; (*h*), appointment of the first auditor; and (*i*), the remuneration of the auditor.

"Art. 28. Inasmuch as the said *C. H. Denham*, while such chairman as aforesaid, is to have the supreme control in the management of the concern, he may, when and as he thinks fit, exercise any of the authorities expressly or by implication conferred by these presents on general meetings and boards respectively, and to the extent to which he does so his authority shall supersede the authority of general meetings and boards respectively, save only that it shall not be competent to the said *C. H. Denham* to determine by his own authority any matter which by the statutes is required to be determined by special resolution."

Art. 29 related to the powers and duties of directors, and provided, in substance, that, "subject and without prejudice to the authorities thereby given to or conferred on" *Denham*, the general conduct and management of the business of the company should be vested in the directors, who should exercise and perform the special powers and duties therein mentioned, including keeping proper accounts, making up the accounts half-yearly, procuring the accounts to be duly audited, making to every ordinary meeting a full report of the affairs and prospects of the company, and recommending for the approval of general meetings the matters to be determined by special resolution.

"Art. 61. No dividend shall be payable except out of profits arising from the business of the company."

Arts. 66 and 67. Accounts to be rendered by the directors to the company at least once a year.

"Art. 68. A balance sheet shall be made out in every year and laid before the company in general meeting, and such

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balance sheet shall contain a summary of the property and liabilities of the company.

"Art. 69. Once at the least in every year the accounts of the company shall be examined, and the correctness of the balance sheet ascertained by one or more auditor or auditors."

Art. 70. The first auditor to be appointed by *Denham*, and subsequent auditors by the company at an ordinary meeting.

The whole of the company's 12,000 £5 shares were issued, £3 per share being paid on allotment. Of these shares 4000 were taken by *Crook*, one of the directors named in the articles, but some of them he subsequently disposed of. *Crook* was *Denham's* brother-in-law, and resided in the neighbourhood of *London*, but was not engaged in any business.

In each of the four years 1874–1877, the company declared and paid a dividend of 15 per cent. per annum on the paid-up capital, the total dividends for those four years amounting to £21,600, of which *Denham* received £6952, *Crook* £4735, *Midgley* £377, and *Waghorn* £101. It ultimately turned out, however, that these dividends had been paid out of capital and not out of profits, and accordingly it was now sought to recover the whole £21,600 from the directors of the company under the following circumstances:—

The four directors against whom these summonses were taken out were *Denham*, *Crook*, *Midgley*, and *Waghorn*, they having been directors during the years the dividends in question were paid. *Denham*, *Crook*, and *Waghorn* were also three of the subscribers to the memorandum of association. *Denham* was, as provided by the articles, the managing director of the company from its commencement. *Crook* retired twice in rotation, but was on each occasion immediately re-elected.

Midgley, who was a quarry manager, had been part owner of certain quarries, and had joined in selling them to the company in consideration partly of shares, with £3 paid up, and partly of cash. He was appointed a director in 1874, but resigned in 1877 on account, as he alleged, of *Denham* refusing to give him information he had asked for respecting the company's affairs.

Waghorn was, at the date of the formation of the company, book-keeper and traveller to *Denham*, and he subsequently con-

tinued in the same position with regard to the company. He was appointed director in 1877 on *Midgley's* resignation. *Taylor*, one of the original directors named in the articles, had been dead some years.

It appeared from the evidence that *Waghorn*, both before and after he became a director, was in the habit of preparing, under *Denham's* direction and superintendence, the rough balance sheets, of which the printed balance sheets issued to the shareholders and duly signed by the auditors of the company were summaries; that he had frequent conversations with *Denham* as to the accounts, no other director being present; that he was a weekly servant of the company at weekly wages, and completely under the control of *Denham;* that the drafts of the printed balance sheets were always prepared by *Denham*, who determined the dividend to be declared; and that *Denham* kept the balance sheets and papers relating to them in the safe at his private office in *Halifax*, of which he only had the key. It further appeared that the balance sheets thus prepared under *Denham's* superintendence were laid before the board meetings at which *Denham*, with one other director, was always present, but that *Crook* never attended any of the board meetings until 1878, when questions arose respecting the correctness of the accounts, and that in fact, though he was present at some of the general meetings of the company, he took no part whatever in the preparation or adoption of the reports and balance sheets, except on one occasion, when, at the annual general meeting of the company in 1876, he, at *Denham's* request, formally moved the resolution declaring a dividend of 15 per cent. per annum. *Denham* presided as chairman at all the meetings of the company, and usually himself moved the adoption of the directors' reports and the balance sheets. *Crook* stated in evidence that down to about April, 1879, he never saw or asked to see any book or paper relating to the company's accounts, except the printed balance sheets: that he never asked how the assets, as appearing on those balance sheets were made out, and, in fact, never went into the matter at all; that, owing to his implicit confidence in his brother-in-law, *Denham*, the book-keeper, *Waghorn*, and the auditors, and considering the wide powers vested in *Denham* by the articles, he took it as a matter of course that the

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profits shewn on the balance sheets were right; that in 1879, owing to reports he had received from shareholders, he looked into the books for the first time; that he did so at the company's office in *Halifax* alone with *Waghorn*, who, it appeared, had been instructed by *Denham* "not to let him know anything, but to give him plenty of books and he would soon get tired;" that not being a business man he did not understand accounts, but, so far as he could judge, the affairs of the company seemed to be in a satisfactory condition; and generally, that from the beginning of the company to the end he trusted entirely to *Denham's* representations, and had no notice, knowledge, or suspicion that the balance sheets were inaccurate, insufficient, or improper, or that the profits appearing thereby were otherwise than properly earned and divisible.

The directors' annual reports for the years 1874–1877, which were printed and sent in the usual way to all the shareholders prior to the annual general meetings, and eventually adopted as above mentioned, were very short and all similar in form. They were headed with the names of the directors, including *Crook*, and commenced with the following clause: "The directors beg to present a statement of accounts as audited, which they trust will be satisfactory, and from which the shareholders will observe a dividend of 15 per cent. (less income tax) is recommended for the past year." Then at the foot were the words, "By order of the directors.—*C. H. Denham*, Chairman."

To each report was annexed the balance sheet for the previous year, bearing at the foot the words "examined with books and vouchers and found correct.—*John Clay & Son*, Auditors."

The auditors had been appointed by *Denham*, but it appeared from the evidence that they were professional accountants of experience and repute in the district.

The company having fallen into difficulties, a resolution for a voluntary winding-up was passed on the 23rd of June, 1880, and under an order dated the 26th of June, 1880, the winding-up was continued under the supervision of the Court.

When the company's books came to be examined in the liquidation, it appeared that the accounts had been carefully manipulated in such a manner as to shew for each of the four

years in question, a large balance of profits available for a 15 per cent. dividend. These supposed large profits were shewn principally by over-estimating and treating as assets various items, the greater part of which were properly attributable to capital; such as "overpaid rent account," "quarry-barings" and "quarry labour."

A summons was then taken out by the present applicants, the *Halifax Commercial Banking Company, Limited*, who were creditors of the company for £9188, and *William Chambers*, a debenture-holder for £400, asking that the conduct of *Denham* and *Crook* "with reference to the declaration and payment of dividends under delusive and fraudulent balance sheets, and with reference to breaches of trust in relation to the company, might be examined into," and that *Denham* and *Crook* might be respectively compelled to pay to the liquidator or contribute to the assets of the company, by way of compensation in respect of such payment of dividends and breaches of trust, severally and also jointly with their co-directors from time to time, including *Waghorn*, the sum of £21,600 (the total amount of the four years' dividends) with interest.

Subsequently the same applicants took out a further summons in similar terms against *Midgley* and *Waghorn*.

After the company had gone into liquidation, *Denham* became bankrupt. *Midgley*, it appeared, was a man of small means, *Waghorn* possessed none, and the estate of *Taylor*, the deceased director, was not worth proceeding against. The applicants' case was therefore, mainly, directed against *Crook*, he being a man of large property.

Upon the summonses coming on for hearing:

Romer, Q.C., and *Bardswell*, for *Midgley*, asked the sanction of the Court to an arrangement under which their client had agreed to pay the applicants £100 in satisfaction of their claim against him.

Davey, Q.C., and *A. Young*, for the liquidator, having assented,

HIS LORDSHIP sanctioned the compromise.

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Denham and *Wag* the *horn* did not appear.

The case against *Cr* the first *ook* was then proceeded with.

Macnaghten, Q.C., and *W* e with *V. Baker*, for the applicants:— not to

We submit that these direct ors have, in paying dividends out of capital, acted *ultrà vires* and c derstan mmitted a breach of trust, for which, under sect. 165 of the *Compan mpany es Act*, 1862, they are liable both jointly and severally: *In re Nation at from al Funds Assurance Company* (1). As regards *Crook*, we make no v to L harge of wilful fraud against him, but we do say that in omitting icion o attend the board meetings and to fulfil his duties as a director, r, or the was guilty of such gross negligence as to render him responsible erly e for the fraud committed by his co-directors. Moreover, his nar ne appears prominently in the list of directors at the head of ea 1877, ch report which declared the 15 per cent. dividend, to which a hareho balance sheet purporting to shew a profit is annexed, and at th dopted e foot of which are the words "by order of the directors." This The, we submit, is sufficient to make *Crook*, as well as every ot *Crook*, her director under whose name and authority the report is ostensib s beg ly issued, responsible for the contents of that report. Mere ign trust - rance is no defence. "A plea of ignorance by a director, or that erve anything was done by him for the sake of conformity, is merely for a plea of guilty, and it is an admission of liability to account for of the sums misapplied:" *Per* Lord *Romilly*, M.R. in *Land Credit Company of Ireland* v. *Lord Fermoy* (2). Directors are in the us position of trustees for the company, and therefore *Crook* is d liable as for a breach of trust, besides as being a party to the representation that profits had been made and a 15 per cent. d dividend earned: *Flitcroft's Case* (3). Persons making, though f in ignorance, untrue assertions of fact are as responsible as if they had asserted that which they knew to be untrue: *Reese River Silver Mining Company* v. *Smith* (4).

Ince, Q.C., and *Hull*, for *Crook*:—

We submit that *Crook* cannot be held liable as a trustee for moneys paid under circumstances of which he had no know-

(1) 10 Ch. D. 118.
(2) Law Rep. 8 Eq. 7, 12.
(3) 21 Ch. D. 519.
(4) Law Rep. 4 H. L. 64.

ledge. It is incorrect to say that the position of a director is that of an ordinary trustee: he is only a trustee in a sense—a "*quasi* trustee," as the late Master of the Rolls said in *Flitcroft's Case* (1). Again, as regards the duties of a director, he is bound to do no more than what is stipulated in the partnership deed of the company, that is to say, its articles of association. What then was *Crook's* position under the articles here? By these articles the whole management of the company was vested in *Denham*, who was to have the "supreme control," and to be irremovable from the board, and whose authority was to "supersede the authority of general meetings and boards." Again, the quorum of directors was to be two, the chairman, that is, *Denham*, having two votes. Thus he could virtually oust the authority of the boards altogether. And further, he had the right of preparing the reports and fixing the amount of dividend. Why then should *Crook* be held responsible for having left *Denham* to do what he was expressly authorized to do by the articles? With regard to the question of presuming assent on the part of *Crook* to the declaration of dividend on the ground that his name appears on the report, we submit that a report to shareholders should not be treated in the same way as a prospectus issued to the public, as in *Peek* v. *Gurney* (2). The representation that there are profits available for a 15 per cent. dividend is a representation only by the person who prepared the report. "By order of the directors" does not necessarily mean all the directors; the particular directors who were actually parties to the preparation and issuing of the reports are alone responsible for it: *Cargill* v. *Bower* (3). To establish a liability against an individual director of a company for fraud, or conduct amounting to fraud, you must make out a case against him personally: *In re National Funds Assurance Company* (4); *Weir* v. *Bell* (5); *Cargill* v. *Bower*. It is said that *Crook* neglected his duty in not attending the board meetings; but it is settled that a director is not bound to attend every board meeting, and that he is not liable for misfeasances committed by his co-directors without his know-

(1) 21 Ch. D. 534.
(2) Law Rep. 6 H. L. 377.
(3) 10 Ch. D. 502.
(4) 10 Ch. D. 118.
(5) 3 Ex. D. 238.

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ledge at board meetings at which he was not present: *Perry's Case* (1).

Nor is it the duty of a director to look at the entries in the books: there is no presumption of law that he knows the contents of the books of the company: *Hallmark's Case* (2). In this case, even when *Crook* did examine the books, he could not discover the fraud. It is not correct to say that a director is under all circumstances liable for the acts of his co-directors. In *Land Credit Company of Ireland* v. *Lord Fermoy* (3) the director who was ignorant of the particular transaction complained of was, on appeal, held not to be liable for the acts of his co-directors. It is proved here that the company had a regular book-keeper, *Waghorn*, who had been in the habit of keeping *Denham's* books before the sale of his business to the company, and was therefore to all appearances a competent and proper person; and that they also had well known accountants of repute as auditors. *Crook* therefore cannot be held liable for having placed reliance upon the representations of these duly authorized officers of the company that there were profits available for dividends, he having no reason to believe that those representations were otherwise than true: *Rance's Case* (4). Persons dealing with companies are presumed to do so with knowledge of their articles of association: *Ernest* v. *Nicholls* (5); consequently the applicants here must be taken to have acted with knowledge that the whole management and control of this company and its affairs, including the power of fixing a dividend, were virtually in the hands of *Denham* alone, and that his co-directors held only a subordinate position. Upon the whole, we submit that no case of negligence has been made out against *Crook* rendering him liable for this claim.

Macnaghten, in reply:—

We do not allege fraud against *Crook;* to bring a director within sect. 165 of the *Companies Act*, 1862, it is not necessary to make out a case of fraud. It is sufficient if we prove gross or

(1) 34 L. T. (N.S.) 716.
(2) 9 Ch. D. 329.
(3) Law Rep. 5 Ch. 763.
(4) Ibid. 6 Ch. 104.
(5) 6 H. L. C. 401, 419.

wilful negligence: *Rance's Case* (1). And I submit it was gross negligence on the part of *Crook*, who was one of the founders of the company, and one of the subscribers to the memorandum of association, never to have attended a single board meeting during the four years in question, or to have troubled himself to make a single inquiry into the affairs of the company or investigation of its books during that period. As Lord *Hatherley* said in *Land Credit Company of Ireland* v. *Lord Fermoy* (2), it is the duty of directors to be awake, and their being asleep will not exempt them from the consequences of not attending to the business of the company. This was a wholly delusive and improper dividend—a return of capital in express violation of the articles of association, and therefore money which the Court can order to be returned under sects. 101 and 165 of the *Companies Act*, 1862: *Stringer's Case* (3). I do not say there is no difference between a director and an ordinary trustee, but I submit that, as regards money which a director has himself improperly taken out of the company, he is literally in the position of a trustee, and therefore *Crook* is at least liable to repay the £4735 received by himself as dividends; and he must also be held liable for the dividend for which he moved the resolution at the general meeting in 1876. Directors are, I submit, to be treated as trustees of moneys collected by them by means of subscriptions. They are in reality the managing partners of a partnership concern; and any director having money of that concern, that is, of the company, in his pocket, is liable to account for that money as a trustee.

[CHITTY, J.:—Voting a dividend is an act of the shareholders, not of the directors.]

If you can, by shewing that a portion of the capital of the company is in the pocket of a contributory, get it back under the sections I have mentioned, as laid down in *Stringer's Case*, much more is that so in the case of a director. *Weir* v. *Bell* (4) and that class of cases are cases of actions for deceit, and do not apply to such a case as the present. Although these articles vest large powers in *Denham*, they at the same time impose duties on

(1) Law Rep. 6 Ch. 104.
(2) Ibid. 5 Ch. 763, 770.
(3) Law Rep. 4 Ch. 475.
(4) 3 Ex. D. 238.

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all the directors, including the keeping and rendering of proper accounts. It was their duty to exercise proper care and diligence against fraud upon the company, and they cannot rely upon *Denham's* acts as discharging them from liability for having paid away capital in the shape of dividend. It is too late now for *Crook* to repudiate his liability for these reports. This is simply a case in which a director is endeavouring to avail himself of his own ignorance, resulting from his own negligence, in order to escape from liability, and I submit no authority can be produced to shew that such an attempt can be successfully made.

CHITTY, J.:—The case is one of such importance, especially with regard to Mr. *Crook's* position, that I reserve my judgment.

Nov. 26. CHITTY, J., after stating the object of the application and that, in his opinion, the charge against *Denham* and *Waghorn* of having concocted false and fraudulent balance sheets had been clearly established, continued:—

This is C in the Headnote

As regards *Crook*, who acted as a director throughout the period of the four years when the dividends were paid, it is not charged against him that he was guilty of actual fraud, or that he was in fact party or privy to the fraud committed; and I am satisfied, on the evidence, that he had not any suspicion of it. I am also satisfied that he did not wilfully shut his eyes or wilfully abstain from making inquiries for the purpose of allowing *Denham* and *Waghorn* to commit the frauds, and that until the winding-up he had confidence in the integrity of *Denham* and *Waghorn*. It is argued, however, that he is liable on the ground of negligence or abnegation of his duties amounting to negligence though not amounting to a fraud, and that he is therefore responsible for the directors' reports and balance sheets on the footing of which the dividends were declared at the general meetings.

The constitution of the company is remarkable.

[His Lordship then read the articles of association as above stated, observing that supreme control of an extraordinary character was vested in *Denham*. He then went through the evidence relating to the preparation of the reports and balance

sheets, and coming to the words at the foot of each report, "By order of the directors," proceeded:—] That does not mean that the report shall bind the directors generally. The mere fact of the directors' names being at the top does not, in my opinion, alter the true nature or the true construction of the document in this respect. I therefore hold that the document is not to be treated as having been issued by the whole body of directors, and that it is not to be treated as having been issued by Mr. *Crook*. Thus far it appears to me to be clear that Mr. *Crook* was not a party to the reports or balance sheets, and that he did not intend to be responsible for them. But it has been argued that he is, in point of fact, responsible for them, because when they came to his knowledge he was bound to take steps to repudiate them, and not having done so, he must be presumed to have sanctioned and adopted them. He undoubtedly received the reports previously to the general meetings, together with the balance sheets, and one of these meetings he himself attended, and at Mr. *Denham's* suggestion moved the resolution for the dividend. A report of directors to shareholders, and a prospectus issued to the public for the purpose of obtaining subscriptions stand obviously upon a different footing. Speaking generally, a prospectus purports to be issued by all the directors whose names appear on the face of it; and it may well be that an ignorant director who has not really been personally engaged in issuing the prospectus is bound on the ground of his ratification; and such ratification may, when circumstances justify it, be inferred from his abstaining from taking any steps to inform the public that he was not a party to issuing the prospectus. But the report of directors at a general meeting is issued under the powers of the articles, and is generally, as it certainly was here, made by the board acting as such. The shareholders in this company knew, or must be deemed to have known, the provisions of the articles that two directors were to be a quorum, and therefore they were not justified, in my opinion, in accepting the report as the act of all the directors. Mr. *Crook* was not under any obligation to disclaim the reports and balance sheets, and the attempt to fix him personally for them, in my opinion, fails. Neither, in my opinion, is he liable

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in respect of one particular dividend because he moved the formal resolution for it at a general meeting. No doubt Mr. *Crook* has been guilty of considerable negligence in the discharge of the duties of his office, for he did not attend a single meeting of the directors during the period in question, nor indeed until after inquiries had been set on foot. He appears to have abstained from doing anything whatever, being misled, as he says, by reason of the extraordinary powers conferred by the articles upon *Denham*. He was in fact deceived as many other shareholders were. No man is bound to presume a fraud; and, as Lord *Hatherley* said in the case of *Land Credit Company of Ireland* v. *Lord Fermoy* (1), "whatever may be the case with a trustee, a director cannot be held liable for being defrauded; to do so would make his position intolerable." It is sufficient if directors appoint a person of good repute and competent skill to audit the accounts and have no ground for suspecting that anything is wrong. The directors are not bound to examine entries in the company's books. As the late Master of the Rolls, Sir *George Jessel*, said in *Hallmark's Case* (2), "I know no case except *Ex parte Brown* (3) which shews that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge which it is sought to impute to him in this case." In the present case the accounts appear to have been duly audited, and the auditors were, as is shewn by the affidavits, apparently accountants of skill and integrity. The auditors are not before me on the present occasion, but still I am bound to say that, from the evidence such as it is, it does appear that the auditors themselves were to some extent cognisant of and parties to the fraud. Mr. *Crook* was, however, entitled to trust them; there was nothing at all to arouse his suspicions that they were not doing their duty. In my opinion, therefore, Mr. *Crook* was not guilty of such gross and wilful negligence, as in the language of Lord *Romilly* in *Rance's Case* (4), was equivalent to fraud. No decision has gone the length

(1) Law Rep. 5 Ch. 772.
(2) 9 Ch. D. 332.
(3) 19 Beav. 97.
(4) Law Rep. 6 Ch. 104.

of rendering a director liable under such circumstances as those in which Mr. *Crook* was placed. In *In re National Funds Assurance Company* (1), and in *Flitcroft's Case* (2), it was proved to the satisfaction of the Court that all the directors who were rendered liable had actual knowledge that no profits had been made. In *Rance's Case* (3), there was in fact no balance sheet, and there was a reckless payment made by the directors without ascertaining, or having anything before them to shew, that profit had been made. [His Lordship then read the judgments of Lords Justices *James* and *Mellish*, in that case, as authority that, if a company's accounts are made out by proper servants, and dividends declared on those accounts, the Court will require strong reasons for setting aside the accounts or declaring the dividends to have been improper. His Lordship then proceeded :—]

No distinction, I think, can be made as against Mr. *Crook* in respect of dividends that were paid to other shareholders and dividends that were paid to himself. In his reply, Mr. *Macnaghten* insisted upon this distinction ; but I gather, particularly from an observation by Lord Justice *Cotton* in *Flitcroft's Case* (4), that no distinction can be made between dividends paid away to shareholders and dividends paid to directors, where, as in the case before me, there is no fraud, and the directors, as Mr. *Crook* no doubt did, rely on representations such as those that were made here. Mr. *Crook* was, in my opinion, undoubtedly deceived. It is said that if he had investigated the accounts he would have discovered that they had been falsified. But Mr. *Crook* is a country gentleman ; he is not a skilled accountant ; and it does appear that after these dividends had been paid Mr. *Crook* was set upon inquiry, and that he then immediately proceeded to take steps to examine the accounts. For that purpose he went to *Waghorn*, and *Waghorn*, acting apparently on the instructions of *Denham*, shewed him everything. He shewed him a great deal too much, with the result that Mr. *Crook*, who was, as I have said, a country gentleman and not a skilled accountant, discovered nothing. These rogues, in short—for roguery it was—

(1) 10 Ch. D. 118.
(2) 21 Ch. D. 519.
(3) Law Rep. 6 Ch. 104.
(4) 21 Ch. D. 519, 532.

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put before him so much that he came away with as little information as he possessed when he went. I am satisfied that if Mr. *Crook* had endeavoured during the period in question to make an investigation, the investigation would have ended in the same way.

On the whole case, I think Mr. *Crook* is not liable, and that this summons must be dismissed; but a director who has abstained during the long period of four years from executing in any way the duties of his office cannot complain, if afterwards, on the company being wound up, and there being a disastrous result, his conduct is called in question, and I think the parties were quite justified, as against him, in making the investigation they have, and that justice will be done by not giving Mr. *Crook* any costs.

As against *Denham* and *Waghorn* I make an order declaring them jointly and severally liable for the £21,600, with interest at 5 per cent. per annum upon the several portions thereof from time to time paid by way of dividend from the dates of payment, and for the costs of these applications; and an order for payment accordingly.

Solicitors: *Williamson, Hill, & Co.*, for *Foster, England & Foster, Halifax; Brown, Son, & Vardy; Jacobs & Vincent*, for *North & Co., Leeds.*

G. I. F. C.

COOKE *v.* WILBY.

CHITTY, J.

1884

Jan. 4, 8, 11.

[1883 C. 2767.]

Practice—Affidavit—Foreign Country—Notary Public—Consul—15 & 16 *Vict. c.* 86, *s.* 22 [*Revised Ed. Statutes, vol. xi. p.* 519]—*Court of Probate Act*, 1858 (21 & 22 *Vict. c.* 95), *s.* 31 [*Revised Ed. Statutes, vol. xiii. p.* 397]—*Rules of Supreme Court*, 1883, *Order* XXXVIII., *r.* 6; *Order* LXXII., *r.* 2.

Before and after the Act 15 & 16 Vict. c. 86, affidavits sworn in foreign parts out of Her Majesty's dominions before a notary public might be filed, and that practice continued in force down to the time when the Rules of the Supreme Court, 1883, came into operation.

Held, that this practice is not abrogated by Order XXXVIII., r. 6, and Order LXXII., r. 2, of the Rules of 1883, and may be followed at any rate in cases where the practice under the Rules of 1883 would be very inconsistent.

THIS was an *ex parte* application for leave to file an affidavit which had been sworn before a notary public at *Birmingham*, in the State of *Alabama, U.S.A.*

The person before whom the affidavit was sworn was in fact a notary public qualified to administer an oath according to the law of the State of *Alabama*, and his signature was duly verified according to the same law. It was proved that the nearest consul or vice-consul was resident 150 miles from *Birmingham*.

Bardswell, in support of the application:—

The case of *De Leon* v. *Hubbard* (1) has thrown doubts on the practice of allowing affidavits of this class to be filed. I submit that the practice which has hitherto existed is independent of the *Probate Court Act*, 1858, and is founded on the practice of the old Court of Chancery which existed before the Act 15 & 16 Vict. c. 86, and was not altered by it: *Haggitt* v. *Iniff* (2); *In re Davis' Trusts* (3); *In re Earl's Trust* (4); *Levitt* v. *Levitt* (5).

By sect. 21 of the *Judicature Act*, 1875, all procedure then in force by custom is preserved unless inconsistent with the Rules of Court, which I submit is not the case here.

(1) W. N. (1883) 197.
(2) 5 D. M. & G. 910.
(3) Law Rep. 8 Eq. 98.
(4) 4 K. & J. 300.
(5) 2 H. & M. 626.

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The question is whether an affidavit can be filed which was sworn in foreign parts before a notary public. It has been proved before me, that the nearest of Her Majesty's consuls or vice-consuls resides at the distance of 150 miles from the place where the deponent lives.

Rule 6 of Order XXXVIII. of the Rules of the Supreme Court, upon which the question principally turns, is almost a copy of sect. 22 of the Act 15 & 16 Vict. c. 86, and is, so far as it is necessary to read it, in these terms: "All affidavits in causes or matters depending in the High Court may be sworn in any colony under the dominion of Her Majesty in foreign parts, before a notary public, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions." The only difference between the wording of this rule and sect. 22 of the last mentioned Act is that in the latter the words are "shall and may be sworn," however I consider that difference immaterial.

In *Haggitt* v. *Iniff* (1) the Court of Appeal held that the old practice which had previously prevailed in the Court of Chancery was not abrogated by the Act 15 & 16 Vict. c. 86, and that, as there appeared nothing in the Act to exclude it, an affidavit sworn before a notary public in the *United States*, where notaries public were authorized by law to administer oaths in any law proceedings in that country, might be filed.

In the present case the evidence shews that the person before whom the affidavit has been sworn is a notary public, and that in the State in question a notary public can administer an oath.

The only question, therefore, which remains is whether the practice which prevailed in the Court of Chancery and in the Chancery Division until the new rules came into operation, of acceding to applications like the present, has been altered. Order LXXII., rule 2 is as follows: "Where no other provision is made by the Acts or these rules, the present procedure and practice remain in force."

In my opinion there is not any other provision within the meaning of that rule which meets this case.

(1) 5 D. M. & G. 910.

Although there is a general provision in Order XXXVIII., rule 6, as to the swearing of affidavits in foreign parts out of Her Majesty's dominions before any of Her Majesty's consuls or vice-consuls, there is no special provision applicable to a case where there is no consul or vice-consul within 150 miles of the deponent's residence.

In my opinion it would be an unreasonable construction of the rule to say that the deponent must travel 150 miles in order to swear his affidavit. I hold, therefore, that the old practice so far as regards this particular application is still in force, and that this affidavit may be filed.

Solicitors: *Jaques, Layton & Jaques.*

G. M.

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Jan. 14.

CARDINALL *v.* CARDINALL.

[1882 C. 5718.]

Practice—Mode of Trial—Trial by Jury—Action assigned to Chancery Division—Official Referee—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 57—*Rules of Supreme Court*, 1883, *Order* XXXVI., *r.* 3.

An action, which falls within one of the classes of actions which, by sect. 34 of the *Judicature Act*, 1873, are specially assigned to the Chancery Division, will not be sent for trial by a jury unless it involves a simple issue of fact, the determination of which will decide the action.

If such an action depends on the determination of mixed questions of law and fact, it ought to be tried by a Judge without a jury, and an order will be made for its trial by the Judge of the Chancery Division to whom it has been assigned, without a jury, even though the Plaintiff has by his statement of claim proposed a different *venue*.

The mere fact that the action will be tried more quickly, is not a sufficient reason for sending it to be tried at the Assizes.

It was not intended by the *Judicature Act* that an official referee should decide the issue in an action; he is only to ascertain the facts so as to enable the Court to decide the issue.

THIS was an application by the Plaintiff, by summons, for an order that the action might be tried by a Judge and jury in the county of *Essex*. There was a counter summons by the Defendant, asking that the action might be tried before Mr. Justice *Pearson* himself, or in the alternative that the issues in the action might be referred to one of the official referees.

The writ was issued in the Chancery Division on the 8th of December, 1882. The statement of claim was delivered on the 2nd of January, 1883. By it the Plaintiff alleged that in May, 1869, it was verbally agreed between him and the Defendant that they should become, and that they did in fact become, partners in the business of land speculators and farmers, upon terms of equal participation in profits and losses; that they carried on the business in partnership until the year 1881, and in the course of the business bought and sold land, and in particular purchased a farm called *Wakelands Farm*, in the county of *Essex*, which was farmed by the Plaintiff and the Defendant jointly until the year 1882, when the same was sold. The Plaintiff alleged that the deposit and purchase-money in respect

of this farm were paid by him on account of the partnership, and that he also from time to time on the same account advanced money for the purpose of carrying on the farming business, and that the sums so advanced by him were largely in excess of the sums contributed by the Defendant, and that there was a considerable balance due to him from the Defendant in respect of the partnership dealings. The Plaintiff had furnished to the Defendant's solicitor an account shewing this balance, but the Defendant's solicitor had returned the account, stating that the Defendant refused to pay the balance, or to account to the Plaintiff on the footing of the partnership, and that in fact the Defendant denied the existence of the partnership. The Plaintiff submitted to account, and pay to the Defendant what (if anything) should be found due to him, on the accounts between them being properly taken. The Plaintiff claimed to have an account taken of all the partnership dealings between himself and the Defendant, and that the affairs of the partnership might be wound up by the Court; the appointment of a receiver, and other consequential relief.

By his statement of defence, delivered on the 22nd of February, 1883, the Defendant denied the alleged agreement for a partnership, and denied that there was any agreement between the Plaintiff and himself for a partnership in any business; he denied that any business had been carried on by himself and the Plaintiff in partnership, and he denied the alleged joint purchase and joint farming of *Wakelands Farm*. He said that, on the contrary, the farm was purchased by the Plaintiff on his own account, and that it had ever since been farmed and managed by the Plaintiff alone; that the farm was sold by the Plaintiff alone, and that the whole of the rents and profits thereof were, until the sale thereof, always paid to or received by the Plaintiff without the intervention of any other person, and that he had never accounted to any other person in respect thereof. The Defendant further said that the deposit and purchase-money in respect of the purchase of *Wakelands Farm* were paid by the Plaintiff, partly by means of money advanced to him by the Defendant by way of loan, and not on account of any partnership, and that, with the exception of the sums thus advanced by him as

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loans to the Plaintiff, the whole of the sums necessary for carrying on the farming business had been found by the Plaintiff himself. He denied that there was any balance due from him to the Plaintiff, and the other allegations of the statement of claim, and said that the Plaintiff had never, until November, 1882, alleged that any partnership had existed between himself and the Defendant, and had never since the purchase of the farm in 1869 paid or offered to pay the Defendant any portion of the profits derived from the farm, or rendered the Defendant any account on the footing of partnership, and the Defendant submitted that the Plaintiff had by *laches* and acquiescence precluded himself from obtaining the relief sought in the action. The Defendant also relied on the *Statutes of Limitation* and the *Statute of Frauds*.

The Defendant also, by way of set-off and counterclaim, alleged that he had, at various periods since the purchase of the farm by the Plaintiff, advanced to him or on his account, various sums of money, amounting in the whole to more than £960, to enable him to complete the purchase and to carry on the business, and the Defendant claimed payment by the Plaintiff of these moneys and interest thereon.

On the 3rd of May, 1883, the Plaintiff delivered an amended statement of claim, in which he stated that he proposed that the action should be tried in the county of *Essex*.

On the 30th of July, 1883, the Plaintiff delivered his reply and defence to the counterclaim. He joined issue upon the statement of defence, except so far as it contained any admissions, and he denied that the Defendant had made any advances by way of loan to him. On the 9th of August, 1883, the Defendant joined issue with the Plaintiff on his reply and defence to the counterclaim, save so far as the same respectively admitted any of the allegations contained in the Defendant's statement of defence and counterclaim.

The Plaintiff's summons was issued on the 4th of December, 1883, and the Defendant's summons was issued on the 11th of January, 1884. By the direction of the Court both the summonses now came on to be heard as motions. No notice of trial had been given.

The Plaintiff lived at *Sudbury*, in *Suffolk*; the Defendant lived at *Halstead*, in *Essex*; and there were affidavits which stated that the witnesses who would be called at the trial lived at or near *Sudbury* or in *Essex*; and that a large mass of correspondence relating to the purchase of the farm, and the carrying on of the farming business, and a number of books of account and other documents relating to the same matters, would be put in evidence. The Defendant's solicitor stated that the Defendant, who was himself a solicitor, would contend that in the matters in question he had acted as the Plaintiff's solicitor, and not as his partner.

Cookson, Q.C., and *H. Tindal Atkinson*, for the Plaintiff:—

Before the new Rules came into operation the Plaintiff would have been entitled, under rule 3 of Order XXXVI. of the Rules of 1875, as a matter of right to give notice of trial by a jury, subject to the power given to the Court by rule 26, with regard to Chancery actions, to direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law. But now rule 3 of Order XXXVI. of the Rules of 1883 provides that, "causes or matters assigned by the principal Act to the Chancery Division shall be tried by a Judge without a jury, unless the Court or a Judge shall otherwise order." This only shifts the *onus* of proof. In the present case there are sufficient reasons for ordering the trial to be with a jury. The trial will come on much sooner at the Assizes than in the Chancery Division. The question at issue is one of fact, Was there or was there not a verbal agreement for a partnership? and this is peculiarly fit to be tried by a jury. Moreover, the witnesses who will be called live in *Essex* or on its border.

They referred to *Clarke* v. *Cookson* (1); *Ruston* v. *Tobin* (2).

Cozens-Hardy, Q.C., and *R. Bramwell Davis*, for the Defendant:—

Rule 3 puts the *onus* of shewing that there ought to be a trial by a jury on the party who asks for it. The present case is very unfit for trial by a jury; the question at issue depends upon the

(1) 2 Ch. D. 746.
(2) 10 Ch. D. 558.

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conclusion to be drawn from a mass of correspondence and other documents. The witnesses can come to *London* as easily as they can go to *Chelmsford*. There would not be time to try the action at the coming Assizes, and the Judge would refer it. If expedition is desired the case might, under rule 7, be ordered to be tried by one of the official referees. No special reasons are shewn for directing a trial by jury. Even under the old rules the Court would in such a case as this have directed a trial without a jury: *Bordier* v. *Burrell* (1); *Garling* v. *Royds* (2). The possibility of delay is not a sufficient reason for making the order which is asked. The trial ought to take place, as we ask, in this Court, without a jury.

Cookson, in reply:—

[PEARSON, J.:—Are you willing that the case should be tried by an official referee?]

The issue arising on the documents is a mixed one of law and fact, and sect. 57 of the *Judicature Act*, 1873, does not apply: *Ormerod* v. *Todmorden Joint Stock Mill Company* (3).

PEARSON, J.:—

No doubt this case is an important one with regard to the construction of the new rules. The action is founded on an alleged verbal agreement for a partnership between the Plaintiff and the Defendant; the dispute is whether there was or was not a partnership. The Plaintiff claims relief on the footing of a partnership, and there is a counterclaim by the Defendant, in which he alleges that moneys have been lent by him to the Plaintiff, and that a large sum is now due to him. It is impossible to say that a decision of the question partnership or no partnership will settle all the issues in the action; if it is decided that there was no partnership, the question will remain whether money has or has not been lent by the Defendant to the Plaintiff. I am asked to send the case for trial by a jury at the Assizes, and it is said that the question, partnership or no partnership, will be decided far

(1) 5 Ch. D. 512. (2) 25 W. R. 123.
(3) 8 Q. B. D. 664.

more expeditiously there than in this Court. If that is a sufficient reason for making the order, then, in the present state of the business in the Chancery Division, I do not see how I could refuse to send half the cases in my list to be tried by a jury. I do not, therefore, attach any great importance to this consideration. And, if I consider what would happen if the case was to go to trial before a Judge and jury, I must on the materials before me come to this conclusion, that all which the Judge could do would be to obtain answers from the jury to questions put by him, and then he must reserve the matter to be argued before himself. The result would be to give the action precedence over other actions which now stand before it. I do not think it was the intention of the Legislature, or of the Judges who framed the new rules, that such a case as the present should be tried by a jury. I think the intention was that, if it appeared that there was a simple question of fact, the verdict upon which would decide the issue in the action, it should be sent for trial by a jury. But, if the action is one of those which, by the *Judicature Act* of 1873, is assigned to the Chancery Division, and the question raised is a mixed one of law and fact, where the verdict of a jury would not decide the case, but the Judge would have afterwards himself to decide the whole matter at issue between the parties, I think it was not intended that such a case should be sent to be tried by a jury. It is admitted that the question in the present case, partnership or no partnership, is a mixed question of law and fact, and in any direction which the Judge could give to the jury he could only put, and obtain answers to, certain questions, and, when he had got their verdict in this way, he must himself apply the law to the determination of the issue between the parties. The action has been properly set down in this Division, and it must be ultimately decided by a Judge. It is probable that when it comes on for trial the Judge will find that he does not require the assistance of a jury, and that the only difficulty will be in applying the law to the facts. I think I ought not to withdraw the action from the Division in which it has properly been set down. I do not consider it a fit case to send to an official referee. In my opinion it was not intended that official referees should decide the issue in an

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action; it was only intended that they should ascertain the facts so as to enable the Court to decide the issue. I shall order the action to be tried before myself without a jury.

Solicitors for Plaintiff: *Miller & Miller.*
Solicitors for Defendant: *Beaumont & Warren.*

W. L. C.

PEARSON, J. 1884 *Jan.* 14, 15.

UNITED TELEPHONE COMPANY *v.* DALE.

[1883 U. 39.]

Injunction—Breach—Committal—Non-service of Order—Notice to Defendant—Patent—Infringement—Sale of component Parts of patented Invention separately.

In order to justify the committal of a defendant for breach of an injunction it is not necessary that the order granting the injunction should have been served upon him, if it is proved that he had notice of the order *aliunde*, and knew that the plaintiff intended to enforce it.

This rule is not limited to cases in which a breach is committed before there has been time for the plaintiff to get the order drawn up and entered.

James v. *Downes* (1) and *Vansandau* v. *Rose* (2) discussed and explained.

Semble, that an injunction granted to restrain the sale of a complete machine, the subject of a patent, will be violated by a sale of the component parts of the machine in such a way that they can easily be put together by any one.

THIS was a motion by the Plaintiffs to commit the Defendants for breach of an injunction granted by Mr. Justice *Fry*, on the 1st of February, 1883. The writ was issued on the 16th of January, 1883, claiming an injunction to restrain the Defendants from infringing two patents for telephonic apparatus, known as *Graham-Bell's* and *Edison's* patents, belonging to the Plaintiffs. A motion by the Plaintiffs for an interim injunction came on to be heard on the 1st of February, 1883. By consent the motion was treated as the trial of the action, and by consent an order was made perpetually restraining the Defendants, during the continuance of the Plaintiffs' patents respectively, from manufacturing,

(1) 18 Ves. 522. (2) 2 Jac. & W. 264.

selling, supplying, letting on hire, or using any instruments manufactured according to the specifications of the Plaintiffs' patents respectively. This order was drawn up, and passed, and was entered on the 23rd of February, 1883, but it was never served on the Defendants. The Defendants were *Henry Dale* and *Edward Dale*, two brothers, who carried on business in partnership. *Henry Dale* was present in Court when the order was made. In September, 1883, the Plaintiffs discovered that the Defendants had in July, 1883, committed a breach of the injunction by selling some instruments to Messrs. *Farmiloe*. The Plaintiffs then threatened to apply to the Vacation Judge for an order of committal, but, on the Defendants expressing their regret and stating that this was the only breach of the injunction which they had committed, the Plaintiffs did not proceed with their intended application to the Court. The Plaintiffs afterwards discovered that the Defendants had committed other breaches of the injunction in February, 1883, by selling some instruments to a Mr. *Tidman*, who acted as agent for the Defendants at *Southampton*. In a letter written by the Defendant, *Henry Dale*, on the 2nd of February, 1883, to *Tidman*, he said: "As I told you when in *London*, be careful about the telephone, as there is just now a great deal of trouble about it, and you see it is no good trying to fight the patent, as it would mean £2000 or £3000, quite out of the question, and besides, very soon there will be some new instruments out that will be clear of all patents. Of course, as the firm for whom you are going to do it know you so well, there will be no questions asked, but do not say you bought the telephone of us, or at least you can say that you have had them some time, for this reason, that we have agreed not to sell any as from the 26th of January. It would not matter if they are supposed to have been sold before then. We had the highest scientific evidence that ours were clear, but then you know one might waste a fortune in law. Of course you can have some more whenever you want them, and you can put them up in any safe place, but, as before said, we will send you no invoices of them, and should any question be asked you could say they had been made a long time. The only thing the Court could do would be to make people take them down again, but it is not

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at all likely anyone will ever know anything about them." The instruments there referred to were sent by the Defendants to *Tidman* on the 13th of February, 1883, and on that day *Henry Dale* wrote a letter to *Tidman* in which he said: "I have sent you instruments and goods by *Pickford* this day. Set of transmitters not invoiced, but are same as before."

It appeared also that the Defendants on the 1st of November, 1883, issued an "*Illustrated Descriptive Price List of Electrical and Physical Apparatus*," manufactured and supplied by them. Among other things mentioned in this list were "microphones and telephonic apparatus and materials, to illustrate the recent inventions of *Graham-Bell*, *Hughes*, *Edison*, and others." Under this head were mentioned "materials for telephonic experiments," which comprised all the parts, including "binding screws," and these parts when put together would form an instrument which when complete would have been an infringement of the Plaintiffs' patents, and it appeared that the parts could be put together without any difficulty by an ordinary skilled workman in a very short time.

There was in this price list a "special note," which stated, 'With reference to telephonic transmitters which were mentioned and figured in our last catalogue (and which wherever in use gave continued satisfaction), we have, in accordance with an agreement, withdrawn from further sale of these instruments. The *United Telephone Company*, who own the *Edison* patent—presumed to cover all combinations of a diaphragm with carbon or other equivalent—decline to license others, or to sell their own instruments, preferring to let them on lease, and therefore any application for telephones or transmitters should be made to them."

Cozens-Hardy, Q.C., and *Moulton*, for the Plaintiffs.

Higgins, Q.C., and *Farwell*, for the Defendants, took the preliminary objection that the order granting the injunction had never been served on them: Rules of Supreme Court, 1883, Order XLI., r. 5; Order XLII., r. 7.

There has been ample time to serve the order. Where the

liberty of the subject is in question the utmost strictness in procedure is always required: *Hinde* v. *Blake* (1); *In re Holt* (2).

[PEARSON, J.:—Is it not sufficient if the Plaintiffs prove that the Defendants had notice of the order *aliunde?*]

The rule is this—It is sufficient to prove that the defendant has had notice of an order for an injunction, if a breach has been committed before there has been time to get the order drawn up and entered, but after the order has been entered, or there has been sufficient time to get it entered, an order for committal for a breach will not be made if the order has not been regularly served on the defendant: *Vansandau* v. *Rose* (3); *James* v. *Downes* (4); *In re a Solicitor* (5); *Daniell's* Chancery Practice (6); *Kerr* on Injunctions (7). We had no reason to suppose that the Plaintiffs would press for a committal. There is no evidence that the Defendant *Edward Dale* knew of the order.

Cozens-Hardy, Q.C., and *Moulton*, for the Plaintiffs:—

Service of the order is not necessary if the defendant knew of it. Here it was a consent order, and the Defendants must have known of it: *Avory* v. *Andrews* (8). The principle is that the Court will not allow its order to be disobeyed by a person who knows that it has been made. The order has been passed and entered, and the Defendants have paid the costs of it. In *Ex parte Langley* (9) it was held that a notice by telegram of the granting of an injunction was sufficient.

Higgins, in reply:—

It does not appear that in *Avory* v. *Andrews* any of the old authorities were cited, and that decision is inconsistent with the current of authority. In *Lord Wellesley* v. *Earl of Mornington* (10) it was held that an agent of the defendant could not be committed for breach of an injunction in which agents were

(1) 5 Beav. 431.
(2) 11 Ch. D. 168.
(3) 2 Jac. & W. 264.
(4) 18 Ves. 522.
(5) 14 Ch. D. 152.
(6) 5th Ed. vol. ii. pp. 1533, 1534.
(7) 2nd Ed. pp. 569, 570.
(8) 30 W. R. 564.
(9) 13 Ch. D. 110.
(10) 11 Beav. 180, 181.

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not named, though he could be committed for contempt in knowingly assisting in a breach. It is a matter of substance, not of mere form, that a person whom it is sought to commit for the breach of an order should have been served with the order, so that he may know its exact terms. The fact that an order is made by consent makes no difference as to the defendant's knowledge of its exact terms—the terms of an order are arranged by the legal advisers of the parties. It is not like an undertaking, where the party who gives it must be assumed to know the terms of it. Though a defendant is for most purposes bound by a consent given by his solicitor, yet for the purpose of a committal it will not be assumed that he knows the exact terms of an order which might have been, but has not been, served on him.

PEARSON, J.:—I wish to hear the facts before I decide upon the preliminary objection.

Cozens-Hardy, Q.C., and *Moulton*, then stated the effect of the evidence:—

It is clear that the Defendants had notice of the injunction, and that there have been wilful breaches of it. In particular, the sale of the separate parts of the instruments, which, as a whole, the Defendants are prohibited from selling, amounts to a breach of the injunction, for any ordinary skilled workman can put the parts together without the slightest difficulty, and the purchaser of the parts will in this way be in possession of a complete instrument in violation of the Plaintiffs' patents.

Higgins, Q.C., and *Farwell*, for the Defendants:—

We admit that there have been breaches of the injunction, but they have not been wilful breaches, and justice will be done by an order for the payment of costs. The order is expressly limited to the manufacture or sale of the patented instrument as a whole; it does not prohibit the manufacture or sale of the component parts.

[PEARSON, J.:—If there was a patent for a knife of a particular construction, and an injunction was granted restraining a defendant from selling knives made according to the patent, and he

was to sell the component parts so that any school boy could put them together and construct the knife, surely that sale would be a breach of the injunction?]

The injunction does not interfere with the issue of price lists.

PEARSON, J.:—

This is a motion to commit for contempt of Court the two Defendants, for the breach of an injunction which was granted with their consent on the 1st of February, 1883, to prevent them from infringing certain patents belonging to the Plaintiffs, known as the *Edison* and *Bell* patents, for transmitters and receivers in telephones.

In the month of January, 1883, this action was instituted, and on the 23rd of January the Defendants were so convinced that they had no defence to the action, that they wrote a letter unhesitatingly and unconditionally consenting to an injunction, and offering an undertaking, with regard, at all events, to one branch of the injunction which was asked against them: and on the 1st of February, 1883, they consented to a decree for a perpetual injunction as to both branches. There could be no mistake, I think, at that time on their part as to the subject-matter of the patents or the exact infringement which was complained of, and their own letter is framed in such a way as to satisfy me that they, of all persons in the world, cannot plead ignorance.

That injunction having been granted, I shall not enter into all the details of the case, because I take it, upon the confession of their own counsel, that the Defendants have infringed the injunction, and I must say further that there has been a very flagrant and, to my mind, a very disgraceful breach of the injunction. In the month of July, 1883, they fitted up certain apparatus for Messrs. *Farmiloe*, and when that was challenged in September, they told the Plaintiffs that this was the only case in which they had (if they had then) violated the injunction, and they actually went so far as to offer the Plaintiffs an inspection of their books, that they might satisfy themselves that what the Defendants said was true. It now appears that in February, after the injunction had been granted, they were actually dealing with Mr. *Tidman*

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for this very apparatus, which they knew they were restrained from manufacturing or selling, sending it to him for sale, and telling him in so many words that they had sent him no invoice, for this reason plainly, that they knew that, if they were to enter the invoice in their books, their books would at once shew the company, if the matter ever came to a dispute, that they had broken the injunction. They were, therefore, attempting, secretly and in fraud, to obtain the very advantage in trade which they were restrained by this injunction from getting. Their statement made in September to the Plaintiffs was false, and, if it had not been for the discovery of the letters which have been referred to, their books would have confirmed, falsely, what they said in September, and the Court would have had the greatest possible difficulty in fixing them with a violation of the injunction. Fortunately for the purposes of justice their letters remain to convict them, and they convict them so clearly that it is absolutely impossible for them to offer any defence to this motion. I need add no more as to the merits of the motion. It is perfectly plain that the Defendants have defiantly disobeyed the injunction which this Court decreed in February.

But a preliminary objection has been taken to the motion, which is one of so much importance that I desire to add a few words upon it, in order that I may state very clearly what my view of the law is. The objection is this, that, whereas the injunction was granted on the 1st of February, 1883, and although the order has been drawn up, passed and entered, it has never been served upon the Defendants, and the rule relied upon is that which is thus stated in the text-books (but, for the reasons which I am about to give, I think stated wrongly), that in no case, after an injunction has been granted, and there has been sufficient time to pass and enter the order and to serve it, will the Court commit the defendant to prison for a breach of the injunction, unless the order has been served upon him. Mr. *Higgins* very properly admitted, for indeed the text-books admit, that, if there is a breach of an injunction immediately after it has been ordered, and before there has been time to pass and enter the order and to serve it on the defendant, the Court will inquire whether the defendant knew of the making of the order, and the defendant

will not be allowed to escape by any subterfuge. If he was in Court when the order was made he will not be allowed to say he did not hear it; if he was just outside the Court, having left it in order that he might not hear the order actually pronounced, he will not be allowed to say that he did not know of it, and that therefore he was entitled to be served with it. But it is said that this rule does not apply where, as in the present case, months have elapsed since the order was or might have been passed and entered, and there has been no service on the defendants. The rule is said to depend upon what was laid down in two comparatively old cases, that is, fifty or sixty years old. One is *James* v. *Downes* (1). There the defendants were present in Court when the order for an injunction was pronounced against them, or when the motion was made, and, after a considerable lapse of time, the order not having been drawn up, a motion to commit them for a breach of the injunction was refused with costs. The injunction was to restrain them from issuing execution on a judgment at law. The report states (2), "the defendants, finding no order was drawn up, proceeded to execution; upon which the plaintiff moved to commit them for a breach of the injunction, stating that they were present in Court when the order was pronounced, or when the motion was made, and referring to the case of *Osborne* v. *Tennant* (3)," in which an order for committal was made, because the defendant was present in Court when the motion for an injunction was made, though he went out just before the order was pronounced. Lord *Eldon* said (4), "My opinion on that occasion" (that is, in *Osborne* v. *Tennant*) "was, and still is, that, if the party was in Court, while the motion was proceeding, he should not, by turning his back before the Court pronounced the order 'let the injunction go,' escape the process; considering it a mere contrivance: but the Court can never intend, that the plaintiff, having obtained the order granting the injunction, is to lie by for four months, as if it had not been granted. The Court, interposing to assist the plaintiff, and prevent his losing the benefit of the process, while

(1) 18 Ves. 522.
(2) Ibid. 524.
(3) 14 Ves. 136.
(4) 18 Ves. 524.

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he is actually pursuing it, cannot consider him entitled under the order for three or four months together." That was a case therefore in which the defendants might very fairly consider that, if the order was not drawn up, the plaintiff did not intend to proceed with it at all, and it was, I conceive, on that ground that the Lord Chancellor refused the order for committal. He said, in effect, "If you choose to act in such a way as possibly to mislead the defendant by what you are doing, this Court will not assist you," and therefore it was held necessary in that case, before the plaintiff could obtain a committal, that they should serve the defendants with the original order. The other case was *Vansandau* v. *Rose* (1), in which the motion to commit was made immediately after the granting of the injunction, and there had been no delay in drawing up the order. But in giving judgment Lord *Eldon* said (2), "In this case, if the warrant of committal is sent to me, I think that I shall not hesitate to sign it. What I have now stated must be subject to this observation, that there has been no delay in endeavouring to get the order drawn up, and the injunction under seal, and serving it when obtained." There, again, I think he is merely stating the general rule that, in any case in which the plaintiff has been guilty of such *laches* that he may possibly have misled the defendant, this Court will not interfere if he has not served the order, shewing by its service that he intends to act upon it. I use the word "possibly" in its largest and widest sense, to shew that this Court will never run the risk of doing that which may be harsh or unjust to the defendant in a case of this kind, by committing him to prison for a breach of an injunction, if there be the slightest doubt whether, owing to the conduct of the plaintiff, he may not have been drawn into the idea that it never was the plaintiff's intention to enforce the injunction. But I do not believe the rule to be, and I shall not act upon the rule as it has been stated to me, that in no case will the Court enforce obedience to its injunction by means of a committal to prison, simply upon the ground that the order has not been served, when it appears beyond all doubt or dispute that the defendant is aware that the injunction has

(1) 2 Jac. & W. 264. (2) 2 Jac. & W. 265.

been granted, and that it is the intention of the plaintiff to enforce it.

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Now, in this present case, it is beyond all doubt or dispute that, from the 1st of February down to the present time, the Defendants have known that the Plaintiffs were relying upon this injunction, which was granted with their consent, and have been perfectly well aware that the Plaintiffs would enforce it, if the occasion should arise for their so doing by reason of the Defendants violating the order. I think that the decision of my brother Mr. Justice *Kay*, in *Avory* v. *Andrews* (1), was perfectly right. In that case it was not disputed that the defendants knew perfectly well that in what they were doing they were violating the order of the Court, and Mr. Justice *Kay*, therefore, refused to attend to the objection that the order had not been served. He said, distinctly in so many words, when that objection was raised, "but you did know of it," and I say the same thing here. The Court would be to a great extent incapable of doing its duty to itself, as well as to her Majesty's subjects, if it were to say, that, with perfectly accurate knowledge of the order of the Court, a defendant is at liberty to defy the Court's authority, and then come to the Court and say, "You cannot visit me for that breach of your order, because the order has not been served upon me." What is the necessity for serving an order upon a defendant, if he knows perfectly well without that service what it is which he is bound to obey?

Under the circumstances of the present case I have no hesitation in coming to the conclusion, that the service of the order was unnecessary, and that there has been a most flagrant and discreditable breach of the injunction; and I should be declining to do the duty which I owe to all the public, sitting here as the Judge of this Court, if I did not grant the present application, and order the Defendants to be committed to prison.

The order will be with costs against the Defendants.

Cozens-Hardy:—

In *M'Neil* v. *Garratt* (2), Lord *Cottenham* took the same view as that which your Lordship has now expressed.

(1) 30 W. R. 564. (2) Cr. & Ph. 98.

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On a subsequent day, on the production of further evidence, his Lordship exempted the Defendant *Edward Dale* from committal.

Solicitors for Plaintiffs: *Waterhouse, Winterbotham, & Harrison.*

Solicitors for Defendants: *Chester, Mayhew & Co.*

W. L. C.

PEARSON, J. 1884 *Jan.* 22.

In re GREAT NORTHERN RAILWAY COMPANY AND SANDERSON.

[1883 G. 2761.]

Vendor and Purchaser—Rescission of Contract—Discharge of Incumbrances on Sale—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 5.

The Court will not, under the power given to it by sect. 5 of the *Conveyancing Act*, 1881, compel a vendor of land to pay money into Court for the purpose of discharging an incumbrance upon the land, when the result of so doing would be to inflict a great hardship on him, as, for instance, if the incumbrance is a perpetual rent-charge, and the sum necessary to procure its discharge would far exceed the amount of the purchase-money payable to the vendor.

A railway company contracted to sell some superfluous land, "free from incumbrances," for £868. The contract provided that, if the purchaser should decline to waive any valid objection to the title, the company might at any time rescind the contract, without paying the purchaser any costs or compensation. The abstract of title shewed that the land was subject to a perpetual rent-charge of £63 issuing out of it, this being the consideration for which the company had purchased it under their statutory powers, for the making of a railway, which, by a subsequent Act, they were authorized to abandon.

The purchaser required the company to procure the release of the land from the rent-charge. This they declined to do, but offered to indemnify him against it. He declined to waive his requisition:—

Held, that the company were entitled to rescind the contract under the condition, and that they were not bound to apply to the Court, under sect. 5 of the *Conveyancing Act*, 1881, to declare the land freed from the rent-charge, or to take any other steps to procure the release of the rent-charge.

THIS was a summons under the *Vendor and Purchaser Act*, 1874.

On the 8th of May, 1883, an agreement was entered into

between the *Great Northern Railway Company* and the Rev. *L. Sanderson* for the sale by the company to *Sanderson* of a piece of land at *Edgware*, containing 6*a*. 2*r*. 29*p*., for the sum of £868, to be paid on the 23rd of June, 1883.

The agreement provided (clause 3) that the company should, within ten days from the signing of the agreement, deliver to the purchaser an abstract of their title to the property, "as freehold of inheritance, free from incumbrances, subject to this agreement, and such title shall commence with the deed of conveyance of the premises to the company, dated the 25th of March, 1869." And, by clause 6, "the purchaser shall not after fourteen days from the delivery of the abstract (and time shall be of the essence of the contract) make any objection to the title, and, if he shall decline to waive any valid objection thereto, the company may at any time rescind this contract, without paying to the purchaser any costs or other compensation whatever."

By the abstract of title delivered to the purchaser it appeared that the company had purchased the land in 1867, under the powers conferred on them by an Act which authorized the construction of a railway from *Edgware* to *Watford*. By an Act passed in 1870 the company were authorized to abandon the construction of the line. By that Act and subsequent Acts the time allowed to the company for disposing of superfluous lands was extended. It appeared also that the company had purchased the land in consideration of a perpetual rent-charge of £63, which it was agreed should be charged on the land itself, as well as on the tolls of the railway.

The purchaser required the company to procure the release of the land from the rent-charge. In answer to this requisition the company said that they would indemnify the purchaser against the rent-charge. The purchaser insisted that the company were bound to satisfy him that they had done all they could to procure a release of the rent-charge. The company declined to do this, and gave the purchaser notice that, unless he would waive his objection, they would rescind the contract under clause 6. After some further correspondence this summons was taken out by the purchaser, asking a declaration that he was entitled to have the land released from the rent-charge, and conveyed to

PEARSON, J. him free from incumbrances, in pursuance of the terms of the contract.

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Renshaw, for the purchaser:—

The company are not entitled to rescind the contract. The purchaser is entitled to an estate in fee simple free from incumbrances, and under sect. 5 (1) of the *Conveyancing Act*, 1881, the company are enabled to get the property released from the rent-charge. They cannot rescind until they have applied to the Court under that section: *Greaves* v. *Wilson* (2); *Engel* v. *Fitch* (3); *In re Jackson and Oakshott* (4). The time to consider whether the Court ought to order a release of the incumbrance under sect. 5 will be when an application is made to it for the purpose; the vendors are bound to make an application, and are not entitled to rescind the contract until they have attempted to get rid of

(1) Sect. 5 provides that—

"(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

"(2.) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

"(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

"(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made."

(2) 25 Beav. 290.

(3) Law Rep. 3 Q. B. 314; 4 Q. B. 659.

(4) 14 Ch. D. 851.

the rent-charge. That is now secured only on the land, for the security on the tolls of the company, created by sect. 11 of the *Land Clauses Consolidation Act*, 1845, does not exist owing to the abandonment of the railway.

F. A. Lewin, for the Railway Company :—

This is a question of title, not of conveyance, and the condition enabling the vendors to rescind applies. The vendors canno compel the owner of the rent-charge to be paid off. In the case which have been cited, the vendor had it in his power to get rid o the incumbrance. In *In re Jackson and Oakshott* (1) the amount of the mortgage money was less than that of the purchase-money. Sect. 5 of the *Conveyancing Act* was not intended to inflict a great hardship on a vendor. It is a matter for the discretion of the Court whether the incumbrance shall be paid off. In *Greaves* v. *Wilson* (2) Lord *Romilly*, M.R., said (3): "He is bound to perform the duties of a vendor as fully as he is able to do, subject to this exception, that it shall be reasonable, for it is always a question of the reasonableness of the thing required; for, although it may be in his power to do it, it may involve him in so much expense and trouble as to make it unreasonable that he should be called upon to do it."

Such a condition as this is inserted in a contract in order to meet the case of objections to the title having been overlooked. In cases of hardship the Court will not enforce the specific performance of a contract for sale: *Costigan* v. *Hastler* (4); *Wedgwood* v. *Adams* (5); *Watson* v. *Marston* (6). In *Wedgwood* v. *Adams* the vendors had expressly undertaken to exonerate the estate from incumbrances, and yet, as it did not appear whether the purchase-money would be sufficient to discharge the incumbrances, or what would be the extent of the deficiency, the Court refused to decree specific performance against the vendors.

Renshaw, in reply :—

The cases relied on are distinguishable. In *Wedgwood* v. *Adams* the undertaking to exonerate the estate was a personal

(1) 14 Ch. D. 851.
(2) 25 Beav. 290.
(3) Ibid. 293.
(4) 2 Sch. & Lef. 160.
(5) 6 Beav. 600.
(6) 4 D. M. & G. 230.

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one given by trustees, and the contract stated that they entered into the contract as trustees.

In *Watson* v. *Marston* (1) a mortgagee, who had foreclosed, contracted to sell the estate, the contract containing a condition that, as the vendor was a mortgagee with power of sale, she would only enter into the usual covenant that she had not incumbered. The purchaser objected to the validity of the foreclosure decree, and insisted on having a conveyance under the power of sale. Evidence was adduced shewing that the condition had been inserted in the contract by inadvertence, and that the vendor never intended to run the risk of opening the foreclosure, and the Court refused to enforce a conveyance under the power of sale. In the present case, the company have expressly contracted to sell free from incumbrances, and cannot, therefore, say that the removal of this incumbrance was not in their contemplation: *Cato* v. *Thompson* (2); *In re Gloag and Miller's Contract* (3).

There will be no hardship if the company are ordered to pay the value of the rent-charge into Court; they have to pay it in any event, and, if they have to pay the capital value of it, they have no right to complain.

PEARSON, J. (after stating the effect of the agreement for sale) continued:—

Upon the purchaser's looking into the title furnished by the company, it appeared that the land is charged with a perpetual rent-charge of £63 per annum, which was created by the company when they bought the land in 1867. They bought it, under the powers conferred on them by their special Act, in consideration of this rent-charge, instead of paying down hard money for it. On discovering this, the purchaser very naturally required that the land should be released from the rent-charge. The company said, "We cannot procure a release, and if you insist on your requisition, we must rescind the contract for sale." The purchaser desires to have the land, and he said to the company, "Under sect. 5 of the *Conveyancing Act*, 1881, you are enabled to

(1) 4 D. M. & G. 230. (2) 9 Q. B. D. 616.
(3) 23 Ch. D. 320.

pay off the rent-charge. No consent of the persons interested in it is required, you have only to apply to the Court, and the Court can direct you to pay into Court such a sum as when invested in government securities will be sufficient, by means of the dividends thereof, to keep down the rent-charge, together with such an additional amount, not exceeding 10 per cent. on the original amount to be paid in, as shall be sufficient to meet the contingency of further costs, expenses and interest, and the Court may thereupon declare the land to be freed from the incumbrance. You ought to make that application to the Court, and, if you do so, you will obtain a release of the land from the rent-charge, and will be able to give me a good title free from incumbrances." I am asked by the purchaser to say that the company are not entitled to rescind the contract, but that they ought to take those steps to procure a release of the rent-charge. The first thing which strikes one is that the contract must have been entered into under a mistake. It is impossible to suppose that the legal advisers of the company were aware of the existence of this rent-charge, the value of which is evidently a great deal more than the real value of the land. If they had been aware of the existence of the rent-charge they would never have entered into so absurd a contract. The question is, whether, under sect. 5 of the *Conveyancing Act*, I have power, or, at any rate, whether I ought, to compel the company to take the necessary steps to release the land from the rent-charge. Sect. 5 is only permissive in its language. It says that "the Court may, if it thinks fit . . . direct or allow payment into Court" of the amount mentioned, "and the Court may, if it thinks fit . . . declare the land to be freed from the incumbrance." In the present case, the sum which would have to be paid into Court would be about £2300. The first question is, whether sect. 5 applies at all to a case of this kind, and I am rather disposed to think that it does not. I am not asked by the vendors to make use of the power conferred by this section, but I am asked by the purchaser to say that the vendors ought to apply to the Court to make use of that power, when the vendors do not wish that the Court should do so. I think that, when it is said that the Court may "*direct* or *allow* payment into Court," the

PEARSON, J. 1884 *In re* GREAT NORTHERN RAILWAY CO. AND SANDERSON.

word "direct" applies to a sale by the Court, and the word "allow" to a sale out of Court. This rent-charge is secured on the land by an Act of Parliament, and I have great difficulty in saying that sect. 5 of the *Conveyancing Act* applies at all to such a case, so as to enable me to take away from the persons who are entitled to the rent-charge that which the other Act has given them, without their consent, and indeed without any notice to them. I should hesitate a long time before I could come to such a conclusion. But, supposing that, upon the application of the vendors, I could declare the land free from this rent-change, what I have to consider is, whether, where the vendors make no such application, I ought to insist on their doing so, when they would have to pay into Court a sum very considerably in excess of the purchase-money of the land. I am not aware that the Court has ever said that a vendor is not entitled to rescind a contract, when the contract contains a provision such as that which is contained in the present contract, and when the result of his not rescinding would be to impose on him terms which he never contemplated, and never could have contemplated, and which, if he was not a rich man, would inflict on him the greatest possible hardship. In my opinion, my decision ought not to depend upon the length of the vendor's purse. In the case of any ordinary vendor, I think I should have declined to order him to pay into Court a sum very nearly three times the amount of his purchase-money, and the fact that the vendors are a wealthy company, ought not, in my opinion, to make any difference. I think that the company are entitled to rescind the contract, unless the purchaser is willing to waive his requisition. This I assume he will not do. Therefore, I shall dismiss the summons, but I shall make no order as to costs.

Solicitors for Company: *Nelson, Barr & Nelson.*
Solicitors for Purchaser: *M. & H. Turner.*

W. L. C.

BOLINGBROKE *v.* HINDE.

PEARSON, J.

1884

Jan. 21, 30.

[1883 B. 5002.]

Mortgagor and Mortgagee—Foreclosure—Redemption—Costs.

The plaintiff in a foreclosure action is as a general rule entitled to an account of only principal and interest due to him on his mortgage, and of the costs of the action. To entitle him to an account of any other costs he must make out a special case.

But, where the Plaintiff was the transferee of a mortgage, on which interest was overdue at the date of the transfer, and the mortgagor was a bankrupt:—

Held, that the Plaintiff was entitled to an account of costs generally.

THIS was an action by the transferee of a mortgage of real estate, against a subsequent mortgagee and the trustee in bankruptcy of the mortgagor, for foreclosure of the equity of redemption in default of payment of what should be found due to the Plaintiff on the mortgage. At the time when the transfer was made there was some interest on the mortgage debt overdue. The Defendants did not deliver any statement of defence, and on the 21st of November, 1883, the Plaintiff served notice of motion for judgment in default of pleading according to his claim.

The case was heard as a short cause on the 1st of December, 1883, when Mr. Justice *Pearson* gave judgment according to minutes which had been prepared by the Plaintiff's counsel. These minutes provided that an account should be taken of what was due to the Plaintiff on his mortgage for principal, interest, and taxed costs, and for his taxed costs of the action, and for foreclosure in default of payment of the amount certified to be due. The Registrar declined to draw up the order in this form, on the ground that a mortgagee is not entitled on redemption to be paid any costs but the costs of the action. The point was now mentioned to the Court.

Swinfen Eady, for the Plaintiff, referred to *In re Radcliffe* (1);

(1) 22 Beav. 201.

PEARSON, J. 1884 POLINGBROKE v. HINDE.

Rees v. *Metropolitan Board of Works* (1); *Blackford* v. *Davis* (2); *Seton* on Decrees (3).

The Defendants did not appear.

PEARSON, J.:—I will look at the authorities. I do not wish to depart from the ordinary form of judgment.

Jan. 30. PEARSON, J.:—

I have looked at the authorities, and I find that the ordinary form of foreclosure judgment simply gives the mortgagee an account of the costs of the action. If he claims any other costs he must shew a special case. The present Plaintiff has, I think, made out a sufficient case, and therefore the judgment may stand according to the minutes.

Solicitor for Plaintiff: *C. F. Martelli*, agent for *Turner & Prior, Norwich.*

Solicitors for Defendants: *E. Doyle & Sons*, agents for *Chittock & Woods, Norwich.*

(1) 14 Ch. D. 372.
(2) Law Rep. 4 Ch. 304.
(3) 4th Ed. vol. ii. pp. 1059, 1063, 1072.

W. L. C.

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BANKRUPTCY—*Act of Bankruptcy*—"*Remaining out of England*"—*Domiciled Englishman residing Abroad*—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 3.] A domiciled Englishman went in 1876, with his family, to reside in France, where he took a house. He was not then being pressed by any creditors in England. For a period of fourteen months in 1877 and 1878 he was in England, carrying on the business of a newspaper which he had purchased, and he then had a furnished lodging in London. During that period he retained his house in France and his wife and family lived in it. During the same period he contracted a debt for costs to a solicitor in London. At the end of the fourteen months he discontinued the business, and went back to his residence in France. In 1880, he, with his family, occupied for nine months a furnished house in England, his house in France being let furnished; at the end of the nine months he returned to that house. He then continued to reside there, paying occasional visits to England. During one of these visits he accidentally met the solicitor, who asked him why he had not paid his debt, and he answered that his newspaper speculation had left him with a number of claims, and he thought if he kept abroad he should be able to settle them more easily. The solicitor presented a bankruptcy petition against the debtor, alleging as an act of bankruptcy that he had remained out of England with intent to defeat or delay his creditors:—*Held*, that, as the debtor was remaining out of England at his own permanent residence abroad, no intent to defeat or delay his creditors could be imputed to him from that circumstance alone, and that the conversation with the petitioning creditor was not sufficient to prove such an intent. *Ex parte* BRANDON. *In re* TRENCH [C. A. 500

2. —— *Act of Bankruptcy—Debtor's Summons—Service—Time—Substituted Service—Bankruptcy Rules*, 1870, *rr.* 59, 61.] Rule 59 of the Bankruptcy Rules, 1870, does not apply to substituted service of a debtor's summons, but, if personal service cannot be effected, an order for substituted service may be made under rule 61 after the expiration of the time limited by rule 59 for effecting personal service, and the substituted service must be effected within such reasonable time as the Court may fix. See Bankruptcy Rules, 1883, rr. 122, 123, 144, 145. *Ex parte* WARBURG. *In re* WHALLEY C. A. 336

3. —— *Debtor's Summons—Service—Inaccurate Copy of Summons—Service by Clerk of Creditor—"Formal defect or irregularity"—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 82—*Bankruptcy Rules*, 1870, *rr.* 59, 61.] On serving a debtor with a debtor's summons the sealed copy which was delivered to him stated the amount of the debt claimed by the creditor to be £24 (instead of £74, the real amount), but these words were added, "being the sum claimed of you by him according to the particulars hereunto annexed." The particulars thus referred to were set forth on the second half of a sheet of paper, the first half of which contained the summons. The particulars stated the amount of the debt, and the circumstances under which it arose, correctly:—*Held*, that the error in the summons was a merely "formal defect" within the meaning of sect. 82, by which the debtor could not possibly have been misled, and that no substantial injustice had been caused to him by it, and, consequently, that the service of the summons was not invalidated by it, and an adjudication of bankruptcy founded on the summons could not be impeached.—The summoning creditor was a solicitor, and the service of the summons was effected by his clerk, instead of by himself or his attorney, or by an officer of the Court, as required by rule 61:—*Held*, that this irregularity also was cured by sect. 82. *Ex parte* JOHNSON. *In re* JOHNSON - - C. A. 112

4. —— *Composition or Scheme of Settlement of Bankrupt's Affairs—Approval of Court—Notice of Meeting of Creditors—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 28—*Trustee—Costs.*] Under sect. 28 of the Bankruptcy Act, 1869, the Court is not bound to approve of resolutions passed by the creditors of a bankrupt authorizing the trustee to accept a composition, or assent to a general scheme of settlement of the bankrupt's affairs, even if it sees that the majority have been acting bonâ fide in the interest of the creditors, and that better terms cannot be obtained for the creditors. It is the duty of the Court to look at all the circumstances, and to have regard to the moral aspect of the case, and not to give its approval to the proposed arrangement, although it may be for the benefit of the creditors, if it can see that the money which they are to receive under it is to be paid in order to hush up and prevent investigation into some discreditable transaction. The trustee in a bankruptcy applied to the County Court for its approval of a composition offered by the bankrupt and sanctioned by resolutions passed by the creditors under sect. 28. The Judge refused to give his approval. The trustee appealed to the Chief Judge, who held that the approval of the Court ought to be given. On the application of dissentient creditors the Court of Appeal restored the order of the Court Court Judge :—*Held*, that the trustee was entitled to apply to the County Court, but that he ought not to have appealed. Consequently, though he was allowed out of the bankrupt's estate his costs of the application to the County Court, he was ordered to pay personally the costs of both appeals. *Ex parte* STRAWBRIDGE. *In re* HICKMAN - - **C. A. 266**

5. —— *Fraudulent Preference—"Suffering Judicial Proceeding"—Non-appearance to Writ—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 92.] A debtor failed to enter an appearance to a specially indorsed writ served on him by his father-in-law. Judgment was signed on the 15th of May (the earliest day possible), a writ of elegit was issued the same day, and on the 16th of May the sheriff seized the Defendant's goods. The inquisition was held on the 19th of May, and the goods were delivered to the Plaintiff in part satisfaction of his debt. On the 22nd of May the Defendant filed a liquidation petition, and his statement of affairs shewed that his debts were £6542, and his assets £607. He had committed no act of bankruptcy before the filing of the petition. He had before the writ was issued been advised by a solicitor, who acted for the father-in-law, and who issued the writ and signed the judgment on his behalf. The debtor also consulted that solicitor after the issue of the elegit, and that solicitor filed the petition for him. The trustee in the liquidation claimed to set aside the judgment and the subsequent proceedings under it as a fraudulent preference :—*Held*, that, though the circumstances were suspicious, yet, having regard especially to the fact that, when the transactions took place, no creditor was in a position to take proceedings in bankruptcy against the debtor, he not having committed any act of bankruptcy, the trustee had failed to prove that the debtor had allowed judgment to go against him by default with the view of preferring the father-in-law. *Ex parte* LANCASTER. *In re* MARSDEN - - **C. A. 311**

6. —— *Proof—Admission by Trustee—Application by Creditor to expunge—Locus Standi—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 20—*Bankruptcy Rules*, 1870, *rr.* 67, 70—74.] A creditor who has proved a debt in a bankruptcy has an interest which entitles him to apply to the Court to expunge the proof of another creditor which has been admitted by the trustee. *Ex parte* MERRIMAN. *In re* STENSON **C. A. 144**

7. —— *Proof—Fraudulent Pledge by Partnership Firm—Other Security held by Pledgee—Separate Guarantee of one Partner—Marshalling Securities.*] A partnership firm wrongfully pledged to their bankers, to secure a debt of the firm, the delivery warrants of some brandy which had been left in their custody in the ordinary course of business by the owner. One of the partners in the firm had no knowledge of the fraud. The debt due by the firm to the bankers was also secured by a separate guarantee of the innocent partner. The firm filed a liquidation petition, and the bankers sold the brandy, and applied the proceeds of sale in part payment of their debt. The owner of the brandy knew nothing of the pledge until the stoppage of the firm. The separate estate of the innocent partner was sufficient to pay all his separate creditors in full (including the balance remaining due to the bankers), and to leave a surplus :—*Held*, that the owner of the brandy was entitled to have the bankers' securities marshalled, and, to the extent of the value of the brandy, to have the benefit of the guarantee, and to prove against the separate estate of the innocent partner.—*Ex parte Alston* (Law Rep. 4 Ch. 168) followed. *Ex parte* SALTING. *In re* STRATTON - - **C. A. 148**

8. —— *Proof by Partner—Competition with Creditors.*] The rule, that neither a partner, nor a retired partner, nor the representatives of a deceased partner, can prove in the bankruptcy of the continuing or surviving partner or partners in competition with the joint creditors of the firm of which the partner, or retired or deceased partner was a member, has no application unless there has been actually proved in the bankruptcy some debt in respect of which the bankrupt or bankrupts and the retired or deceased partner were jointly liable.—The mere possibility that such debts may be proved in the bankruptcy is not sufficient to introduce the application of the rule. *Ex parte* ANDREWS. *In re* WILCOXON **[C. A. 505**

9. —— *Secured Creditor—Valuation of Security—Partnership Debt—Security on Separate Estate—Mutual Credit—Set-off—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 39.] A father and son were partners in business. The father mortgaged real estate, which was his separate property, to the bankers of the firm, to secure the balance for the time being of the current account of the firm. Afterwards he contracted to sell the real estate, and the bankers joined in the conveyance to the purchaser on the terms of an

BANKRUPTCY—*continued.*
agreement that the father should deposit the purchase-money with the bankers in his own name, at interest; that the deposit should be a security to the bankers for the debt of the firm, but that, subject to that security, the deposit should remain the separate property of the father; that, until payment of the debt of the firm, the father should not be entitled to withdraw any part of the deposit, but, until demand by the bankers for payment of the debt, he should be at liberty to draw out half yearly the interest on the deposit; and that, in case demand should be made by the bankers for payment, they might, at any time after the expiration of twelve months from the making of the demand, but not sooner, apply the deposit, and the interest thereon from the time of making the demand, in or towards the payment of the debt of the firm. The father also entered into a covenant for payment of the debt of the firm. This arrangement was carried out:—*Held*, that, the arrangement being a bonâ fide one for the purpose of giving a security to the bankers, in substitution for their security on the real estate, the bankers could prove in the liquidation of the father and son against the joint estate for the full amount of their debt, without deducting the amount of the deposit, and that no set-off arose by virtue of sect. 39 of the Bankruptcy Act, 1869. *Ex parte* Caldicott. *In re* Hart - - - - **C. A. 716**

10. —— *Statement of Debts—Time at which Interest should be calculated — Bankruptcy Act*, 1869, *s.* 126—*Bankruptcy Rules*, 1870, *rr.* 77, 92, 274—*Bankruptcy Forms*, 1870, *No.* 39.] In a debtor's statement of his affairs presented to the first meeting of his creditors under a liquidation petition under the Bankruptcy Act, 1869, he is bound only to shew the state of his affairs at the date of the filing of the petition, and is not, therefore, bound to calculate interest on interest-bearing debts beyond that date. *Ex parte* Fewings. *In re* Sneyd - - **C. A. 338**

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BILL OF EXCHANGE—*Acceptance in Blank—Right to fill up Drawer's Name after Death of Acceptor—Principal and Surety—Discharge of Surety—Laches of Creditor.*] A bill of exchange accepted for valuable consideration, with the drawer's name left blank, may be completed by the drawer's name being added after the death of the acceptor.—A debtor gave his creditor a bill of exchange accepted by himself, but with the drawer's name left blank. The Plaintiff at the same time, as a surety, deposited with the creditor certificates of stock in a joint stock company as collateral security for the debt.—The debtor died without the creditor having filled in the name of the drawer, and his estate was insolvent.—The bill was never presented for payment, nor was notice given to the Plaintiff of its non-payment:—*Held*, that the creditor had not discharged the Plaintiff from his suretyship by his omission to fill up the drawer's name and to give notice of the non-payment of the bill to the Plaintiff. Carter *v.* White - - **666**

BILL OF SALE—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Instrument not in accordance with the Form in the Schedule to the Act.*] By a bill of sale executed two days before his bankruptcy A. (the grantor), in consideration of £30 paid to him by B., and also in consideration of £10 charged by B. by way of bonus, assigned chattels to B. by way of mortgage for payment of £40. A. thereby agreed that he would "forthwith" pay to B. the £40, together with interest and costs then due thereon, and also pay the rent, rates, and taxes, and the premiums for insurance, and would "forthwith" after every payment produce and deliver to B. the receipts for the same. On default in payment of the sums thereby secured, "or if he should do or suffer anything whereby he should render himself liable to become a bankrupt, or remove, or suffer the chattels to be removed from the premises, or if execution should be or should have been levied against the goods of A.," or if he should make default in the performance of any of the covenants, or commit any breach thereof—it should be lawful for B. "forthwith or when and as soon as he should think fit" to enter and take possession, and after taking possession to relinquish and again take possession as often and whenever he should think fit. All expenses of entry and seizure (including a fee of 5 per cent. on the whole amount then due and secured by the bill of sale), and in the exercise by B. of any of the powers, rights, and remedies therein contained, were to be added thereto and to form part of the sum secured, as if such costs, charges, payments, damages, and expenses had originally constituted an integral part of the advance. It was also provided that further advances, not exceeding £100, might be made and added to the security; and it was finally provided (in the terms of the form in the schedule to the Bills of Sale Act, 1882), that the chattels thereby assigned should not be liable to seizure or to be taken possession of by B., for any cause other than those expressed in sect. 7 of the Act:—*Held*, having regard to the provision for bonus in addition to the sum actually paid by the grantee, and especially to the power to seize in events other than those mentioned in sect. 7, that this bill of sale was void as being plainly in contravention of the provisions of the Act of 1882, and the form in the schedule thereto; and that the defects were not cured by the final proviso. *In re* Williams. *Ex parte* Pearce - - - - - **656**

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—— *General Credit and Discount Company* v. *Glegg* (22 Ch. D. 549) followed - 462
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—— *Kennard* v. *Kennard* (Law Rep. 8 Ch. 227) observed upon - - - 373
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—— *Merchants' Company, In re* (Law Rep. 4 Eq. 454) discussed - - - 400
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CHARITY—*Consent of Charity Commissioners—Action by Resident Medical Officer—Recipient of Funds of Charity—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 17.] The Plaintiff had been appointed in pursuance of certain rules framed by the committee of a hospital established by a trust deed of March, 1879, under the powers conferred by the deed, resident medical superintendent of the institution for life, subject to his removal on three months' notice by the committee on proof to them of neglect of duty; and he was let into possession of a house which was annexed to the office. The funds of the hospital not being sufficient to maintain a resident medical officer, the committee gave the Plaintiff three months' notice of removal, no charge of neglect of duty being brought against him. The committee gave the notice with the intention of applying for a new scheme which would render the office unnecessary.—The Plaintiff commenced an action against the committee for a declaration that he was entitled to hold his office during good behaviour, and for an injunction to restrain them from ejecting him from his residence and from otherwise interfering with the tenure of his office: —*Held*, by Chitty, J., on motion for an injunction, that the Plaintiff before issuing his writ ought to have obtained the certificate of the Charity Commissioners as required by sect. 17 of the Charitable Trusts Act, 1853, and the motion was refused with costs.—*Held*, by the Court of Appeal, that if the object of the action was anything beyond preventing the Defendants from excluding the Plaintiff, it required the sanction of the Commissioners. And the Defendants at the Bar expressing their intention not to exclude the Plaintiff unless and until a new scheme should be sanctioned, or until the trial of the action, the order of the Court below was affirmed. BENTHALL *v.* EARL OF KILMOREY - - - C. A. 69

CHARITY—*continued.*

2. —— *Charity Commissioners—Recipient of Charity Funds—Schoolmaster*—16 & 17 *Vict. c.* 137, *s.* 17.] The Plaintiff had been appointed schoolmaster of a free school by the churchwardens and overseers of the parish, and part of his salary was paid to him by the trustees of a charity under a scheme of the Court of Chancery. He brought an action against the trustees, alleging that they had refused to pay what was due to him, and claiming an account of the income of the charity:—*Held*, on demurrer, that the consent of the Charity Commissioners to the action was necessary. Brittain *v.* Overton - 41, n.

CHARTER—Waiver of rights - - 511
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COMPANY—*Articles of Association—Costs of Formation of Company—Claim by Solicitor of Promoter against the Company.*] M. employed P. as solicitor in the formation of a limited company for the purpose of taking over M.'s business. The company was formed, and the articles provided that all expenses incurred about the formation of the company should be paid by the company. After the company was formed P. acted as its solicitor, and M. was one of the directors. At a meeting of the directors, at which M. was present, P. asked for payment of his costs incurred about the formation of the company, and a conversation took place tending to shew that the company would undertake to pay them, but nothing appeared on the minutes. At a subsequent meeting a resolution was passed on the proposal of M. that a cheque for £39 should be given to P. in discharge of a certain part of these costs. The company having been ordered to be would up, P. carried in a claim for his bill of costs, which was referred to the Taxing Master. The Taxing Master disallowed all items incurred before the formation of the company, and Bacon, V.C., refused to disturb his decision. P. appealed:—*Held*, that P. could not maintain his claim on the ground that the company having had the benefit of his services was bound to pay for them, as his services had been rendered on the retainer of M.—*In re Hereford and South Wales Waggon and Engineering Company* (2 Ch. D. 621) considered.—*Held*, further, that P. could not maintain his claim on the ground of novation, the conversation at the first meeting not being supported by anything in the minutes, and the subsequent giving of the cheque being capable of being referred to the obligation of the company to indemnify M. against the costs incurred in its formation, and so not being sufficient evidence of an agreement by the company with P. to pay him. *In re* Rotherham Alum and Chemical Company - - C. A. 103

COMPANY—*continued.*

2. —— *Management—Railway Company—General Meeting of Shareholders—Form of Requisition to call a Meeting—Power to remove Directors—Companies Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 16), *ss.* 70, 88, 89, 91.] A sufficient number of shareholders required the directors of a railway company to call a meeting of the company for the following objects: 1. To appoint a committee to inquire into the working and general management of the company, and the means of reducing the working expenses, to empower such committee to consolidate offices, to remove any of the officers and appoint others, and to authorize and require the directors to carry out the recommendations of the committee; 2. To remove, if deemed necessary or expedient, any of the present directors, and to elect directors to fill any vacancy in the board. The directors issued a notice for a meeting "for the purpose of considering and determining upon a demand of the requisitionists for the appointment of a committee to inquire into the working and general management of the company and the means of reducing the working expenses." The requisitionists gave notice that they should not attend the meeting, as the notice did not provide for all their objects, they did not attend, and they then themselves issued a notice under sect. 70 of the Companies Clauses Act, calling a meeting for the purposes mentioned in their requisition. The directors brought an action in the name of the company to restrain the requisitionists from holding the meeting:—*Held*, by Kay, J., that everything in the first part of the requisition beyond the appointment of a committee was illegal, for that it proposed to transfer the powers of the directors to a committee, and that the directors were therefore justified in not entertaining the latter part of the first head of the requisition:—*Held*, also, by Kay, J., that the second head of the requisition was too vague and did not "fully express the object of the meeting," and that the directors had no power to call a meeting for that purpose, whether a general meeting had power to remove directors or not:—*Held*, therefore, by Kay, J., that the directors had not failed to call a meeting within the meaning of the Companies Clauses Act, 1845, s. 70, that the power of the shareholders to call it had therefore not arisen, and that an injunction must be granted.—*Held*, on appeal, that all the objects of the first part of the requisition were objects that could be carried out in a legal way, that the Court will not restrain the holding of a meeting because the notice calling it is so expressed that consistently with its terms resolutions might be passed which would be ultrà vires, and that the directors were not justified in excluding from their notice the objects in the first part of the requisition other than the appointment of a committee:—*Held*, also, that under sect. 91 of the Companies Clauses Act a general meeting has power to remove directors, that a notice of a proposal to remove "any of the directors" was sufficiently distinct, that the general meeting could at all events fill up vacan-

COMPANY—*continued.*

cies in the board if all the directors were removed or if the directors declined to exercise the power given by sect. 89, and that the directors were therefore bound to include in their notice the objects mentioned in the second part of the requisition:—*Held*, therefore, that the requisitionists were entitled to call a meeting, and that the injunction must be discharged. Isle of Wight Railway Company *v.* Tahourdin - **C. A. 320**

3. —— *Director's Liability—Winding-up—Payment of Dividend out of Capital—Director—Fraud—Negligence—Misfeasance—Breach of Trust—Innocent Director—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 165.] An innocent director of a company is not liable for the fraud of his co-directors in issuing to the shareholders false and fraudulent reports and balance sheets if the books and accounts of the company have been kept and audited by duly appointed and responsible officers, and he has no ground for suspecting fraud. Consequently, if such a director has received, together with the other shareholders, dividends declared and paid in pursuance of such reports and balance sheets, such dividends having been, in fact, payments out of capital, he cannot be called upon, under sect. 165 of the Companies Act, 1862, to repay the dividends so paid, nor even the dividends received by himself. A director is not bound to examine entries in any of the company's books; nor is the doctrine of constructive notice to be so extended as to impute to him a knowledge of the contents of the books.—The articles of association of a company vested in D., the vendor to the company and its chairman, the "supreme control" of its management and business; also power "to the exclusion of general meetings and the board" to determine the amount of dividend, and, generally, power to exercise any of the authorities thereby conferred on the general meetings and boards of directors, and in doing so to "supersede the authority of general meetings and boards." The articles then, "subject and without prejudice to the authorities thereby given to" D., vested the general conduct and management of the business of the company in the board of directors, and required them to keep and render proper accounts, reports, and balance sheets. The articles also prohibited the payment of dividends except out of profits. The company had a regular book-keeper and duly appointed auditors. During a period of four years printed annual reports, with balance sheets annexed, were issued to the shareholders purporting to shew profits each year available for a 15 per cent. dividend, which was declared and paid accordingly. Each report was headed with the names of the four directors of the company including D., the chairman, and ended with the words, "By order of the directors —D., chairman"; the balance sheets being signed as approved by the auditors. C. was one of the directors named at the head of the reports, but he never attended any of the board meetings or took any actual part in the preparation or issue of the reports and balance sheets, and during the four years he only occasionally attended the company's general meetings, at one of which, at D.'s request, he formally moved the resolution declaring

COMPANY—*continued.*

the 15 per cent. dividend for that year.—On the company having subsequently been ordered to be wound up, it was found that the dividends for the four years had been paid out of capital and not out of profits, and that in order to shew profits available for the 15 per cent. dividend the accounts had been fraudulently manipulated by D. and the book-keeper, though without the knowledge of C., who had no grounds for suspecting misconduct on the part of any of the officers of the company. A summons having been taken out under sect. 165 of the Companies Act, 1862, by certain creditors of the company to compel C. to repay the amount of dividends so paid out of capital:—*Held*, that C. was not personally responsible for the fraudulent reports and balance sheets and the dividends paid under them, the words, "By order of the directors" at the foot of the reports not being alone sufficient to fix him with individual liability; and that—having regard to the powers by the articles vested in D., and to the fact that the books had been kept and audited by duly authorized officers, and that C. had had no reason to suspect any misconduct—C. had not been guilty of such negligence or abnegation of duty as to render himself liable to repay the whole amount of capital paid away as dividends to himself and the other shareholders, nor even the amount received by himself alone as a shareholder, nor the single dividend for which he had formally moved the resolution. *In re* Denham & Co. - - - - - - - **752**

4. —— *Winding-up—Director's Qualification—Subscriber of Memorandum—Contract to obtain Qualification—Reasonable Time for Performance—Abortive Company—Companies Act*, 1862, *s.* 23.] A company was registered in June, 1879. B. and H. signed the memorandum of association as subscribers for one share each. By the articles B. and H. were named as original directors, and it was provided that the qualification of a director should be fifty shares. B. and H. attended meetings of the directors, but no shares were allotted to them, nor did their names appear on the register for any shares except those for which they had signed the memorandum. In September B. resigned his office, but H. continued a director. No business was ever done by the company, and in November a resolution was passed to wind up the company. The liquidator placed B. and H. on the list of contributories for fifty shares each:—*Held* (affirming the decision of Kay, J.), that assuming that the contract entered into by B. and H. to obtain a qualification amounted to an agreement to take fifty shares within the 23rd section of the Companies Act, 1862, they were entitled to a reasonable time for performing the agreement, and that under the circumstances such reasonable time had not elapsed at the commencement of the winding-up of the company. Consequently they could not be held liable as contributories in respect of the fifty shares.—Whether the contract amounted to an agreement to take the fifty shares within the 23rd section, *quære*. *In re* Colombia Chemical Factory Manure and Phosphate Works. Hewitt's Case. Brett's Case [**C. A. 283**

5. —— *Winding-up—Member's Liability—*

COMPANY—*continued.*

Liquidation of Member—Winding-up of Company after and pending the Liquidation—Order of Discharge—Subsequent Call—Contributory—Provable Debt or Liability—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 75, 77—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.] The liability in respect of calls of a liquidating member of a company where the liquidation proceedings commence prior to the winding-up of the company, and are pending at the time of the winding-up, is a debt or liability which is not "incapable of being fairly estimated," and which is therefore provable in the liquidation. When, therefore, under those circumstances, a company winding up has failed to carry in a proof in the liquidation proceedings of a member of the company for calls, and the liquidating member obtains his discharge, he cannot afterwards be placed on the list of contributories.—*Furdoonjee's Case* (3 Ch. D. 264) discussed and not followed. *In re* Mercantile Mutual Marine Insurance Association [415

6. —— *Winding-up—Set-off—Claim against Company assigned to Debtor to Company and again assigned by him—Judicature Act*, 1875, *s.* 10—*Rules of Court*, 1875, *Order xix., r.* 3.] A company in 1877 was ordered to be wound up. In 1879 H. took assignments for value of the debts proved by and certified to be due to several creditors. On the 23rd of January, 1880, the liquidator took out a summons under sect. 165 of the Companies Act, 1862, that H., who had been a director, might be ordered to pay £2000, the nominal value of certain shares in the company received by him from the promoter, or to make compensation on the ground of misfeasance. On the 25th of February, 1880, H. assigned the above debts to T. for value, T. knowing nothing of the claims against H., and notice of the assignment was at once given to the liquidator. In July, 1880, an order was made on the summons for H. to pay £2000 to the liquidator. On the 4th of August, 1881, an order was made giving the liquidator liberty to declare a dividend of 11*s.* in the pound on the debts of the company. T. applied for payment of this dividend on the debts assigned to him, but the liquidator claimed to retain the dividend by way of set-off against the £2000:—*Held* (affirming the decision of Kay, J.), that the liquidator had no such right of set-off, and that T. was entitled to receive the dividend. *In re* Milan Tramways Company. *Ex parte* Theys - - - - - **C. A. 587**

7. —— *Winding-up—Transfer of Shares pending Proceedings for Voluntary Liquidation—Voluntary Winding-up followed by Compulsory Winding-up—Commencement of Winding-up—Committee of Directors.*] The articles of a company enabled the board of directors to appoint committees of their own number, and to delegate to any such committee all or any of the powers of the board. Transfers of shares were to be effected only by instruments executed both by the transferor and transferee, and were not to be made without the approval of the board, which had an absolute discretion as to accepting a transfer. On the 2nd of November, 1874, the board appointed H. B. a committee with all the powers of

COMPANY—*continued.*

the board. On the 24th of December, 1874, a board meeting was held, at which only H. B. and the secretary were present. At this meeting transfers, which had on the previous day been executed by X. and Y. to various persons of 1519 shares standing in the joint names of X. and Y., were approved, and the transferees placed on the register. H. B. deposed that all formalities had been waived, and there was no evidence whether the transfers had been executed by the transferees. On the same day a general meeting of shareholders was held, at which resolutions were passed for a voluntary winding-up of the company, and the transfer of its business to a new company, each shareholder in the old company taking the same number of shares in the new, and this was confirmed by a meeting of the 15th of January, 1875. At neither of these meetings did the transferors vote in respect of the shares transferred, but several of the transferees did, and the transferees were registered as shareholders in the new company. It did not appear that the old company was insolvent, but it was considered desirable to reconstitute it. In March, 1877, a petition was presented by some of the transferees for the compulsory winding-up of the old company, upon which an order was made on the 17th of the same month. The transferees were placed on the list of contributories. In 1881 some creditors, pursuant to leave given, applied in the name of the official liquidator to put X. and Y. on a supplemental list of contributories of the old company for the 1519 shares, and if not then on a B list as past members. The application was refused by Bacon, V.C.:—*Held*, that the fact that the transferors knew that the company was on the eve of being wound up voluntarily did not take away their power of transferring their shares, and that the transfers of the 1519 shares were not invalid on that ground.—*Chappell's Case* (Law Rep. 6 Ch. 902) distinguished.—*Held*, also, that a committee of the board of directors need not consist of more than one person, and that H. B. had authority to approve the transfers:—*Held*, also, that it was not to be inferred in the absence of express evidence that the transfers had not been executed by the transferees.—*Held*, that, if they had not been so executed they were not a nullity but only irregular, and that after they had been acted upon and treated as valid for so long a period they could not be impeached:—*Held*, therefore, that X. and Y. could not be placed on the list of contributories as present members:—*Held*, by Lindley and Fry, L.JJ., that X. and Y. could not be placed on the B list as past members, for that the winding-up was to be treated as having commenced at the presentation of the petition, which was more than twelve months after they transferred their shares; dissentiente, Cotton, L.J., who was of opinion that it commenced from the date of the resolution for voluntary winding-up, at which time X. and Y. had not ceased for twelve months to be shareholders. *In re* Taurine Company - - - - **C. A. 118**

8. —— *Winding-up—Witness—Examination before an Examiner—Creditors' Right of attending—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115

COMPANY—*continued.*

—*Bankrupt Law Consolidation Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 120—*General Order of the* 11*th of November*, 1862, *Rule* LX.—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 96.] Admitted creditors of a company in course of winding-up have not a general right under rule LX. of the General Order to regulate the proceedings under the Companies Act, 1862, of the 11th of November, 1862, to attend an examination of witnesses before an examiner summoned under sect. 115 of the Companies Act, 1862. But the Court in its discretion may allow the attendance.—The word "proceedings" in that rule cannot be held to include an examination before an examiner which is strictly of a private character.—*In re Empire Assurance Corporation* (17 L. T. (N.S.) 488) and *In re Merchants' Company* (Law Rep. 4 Eq. 454) discussed. *In re* Grey's Brewery Company - - 400

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—— Lands Clauses Act - - - 472
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CONDITION—Will - - - 458, 605
See Will. 2, 3.

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See Vendor and Purchaser. 2, 3, 4.

CONDUCT OF PROCEEDINGS - - 16
See Practice. 11.

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See Easement. 1.

CONSENT OF CHARITY COMMISSIONERS
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—— Promoters of company - - 103
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—— Rescission - - - - 788
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—— To obtain qualification - - 283
See Company. 4.

CONTRIBUTORY—Bankrupt member - 415
See Company. 5.

CONVENIENCE — Balance of — Injunction — Trade circular - - - 1
See Patent.

CONVERSION—Order for sale - - 735
See Administration Action. 1.

COPY OF SUMMONS—Inaccurate copy - 112
See Bankruptcy. 3.

COPYHOLDS — Enfranchisement — Acknowledgment of right to production of deeds
See Vendor and Purchaser. 1. [600

COSTS—Appointment—Trustees, one insolvent
See Administration Action. 2. [175

—— Bankruptcy—Appeal - - - 266
See Bankruptcy. 4.

—— Former suit—Second suit for same matter
See Practice. 23. [12

—— Mortgage—Foreclosure - - 795
See Mortgage. 3.

—— Previous application - - - 182
See Easement. 1.

—— Settled Land Act - - - 651
See Settled Land Act. 1.

—— Trustee - - - - 72, 617, 710
See Trustee. 1, 2, 3.

COUNTERCLAIM—Default in pleading - 68
See Practice. 12.

COVENANT—*Lease—Restrictions against Trade or Business—Charitable Institution—*"*Home for Working Girls.*"] Covenant in the lease of a house that the lessee should not use, exercise, or carry on upon the premises, any trade or business of any description whatsoever:—*Held*, that a charitable institution called a "Home for Working Girls," where the inmates were received upon payment of a small sum for board and lodging, but from which no profit was derived, was a business, and came within the restrictions of the covenant. Rolls *v.* Miller - - 206

—— Interest—Judgment—Merger - 338
See Judgment.

—— Partnership articles—Annuity of widow of deceased partner - - - 89
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—— Partnership—Action against estate of deceased partner - - - 16
See Practice. 11.

—— Winding up of company—Attendance at examination of witnesses - - 283
See Company. 4.

CREDITOR'S DEED—Costs of trustees - 617
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CROSS-EXAMINATION—Expenses of witnesses
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DAMAGES—*Railway Accident—Compensation—Compromise—No Action brought—Lord Campbell's Act* (9 & 10 *Vict. c.* 93)—*Amendment Act* (27 & 28 *Vict. c.* 95)—*Distribution of the Fund.*] A sum of money was received from a railway company by way of compensation by the executors of a person whose death had resulted from injuries received in an accident on the railway, no action having been brought under Lord Campbell's Act (9 & 10 Vict. c. 93).—The executors brought an action in the Chancery Division, to which all the relatives of the deceased referred to in sect. 2 of 9 & 10 Vict. c. 93, were parties, asking for a declaration as to

DAMAGES—*continued.*
the persons entitled to the money:—*Held*, that the Court could distribute the fund amongst such of the relatives of the deceased as suffered damage by reason of the death, in the same manner as a jury could have done in an action under the Act. Bulmer *v.* Bulmer - - - - 409

—— Abandonment of railway—Landowner 251
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—— Qualification - - - - 283
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See Company. 3.

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See Practice. 20.

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DWELLINGS IMPROVEMENT ACT—38 & 39 *Vict. c.* 36, *s.* 19, *Sched., s.* 6—*Compensation—Publication — Notice to treat — Arbitrator — Lands Clauses Act*, 1845, *ss.* 18, 121.] Sect. 121 of the Lands Clauses Act as to compensation for interests less than a year is incorporated in the Artisans' and Labourers Dwellings Improvement Act, 1875.—The publication of the requisition under sect 6 of the schedule to the Dwellings Improvement Act is analogous to the notice to treat under the Lands Clauses Act, and a landowner affected by it cannot afterwards alter his position. —An arbitrator under the Dwellings Improvement Act may, when a claim for compensation is brought before him, assess the amount of compensation without deciding as to the right of the claimant. Wilkins *v.* Mayor of Birmingham 78

EASEMENT — *Conduit — Interference—Building —Previous Application—Costs.*] The owners of a house had had for many years a supply of water by pipes passing through the adjoining land under circumstances which in the view of the Court created an easement. The owner of part of the adjoining land proceeded to build a house over part of the line of pipes:—*Held*, that the owners of the house had a right to go on the adjoining land and repair the pipes when necessary, and that by building the house their means of access to the pipes would be materially interfered with and rendered more expensive; and an injunction was granted to restrain the building of the house. —The fact that an action has been brought without a previous application to the Defendant does not prevent the Plaintiff from getting his costs of the action. Goodhart *v.* Hyett - - 182

2. —— *Sewer—Obstruction of Access to—Injunction.*] The owner of land through which a sewer ran, made an agreement that he would not set up any buildings so as to prevent reasonable access to the sewer. A subsequent owner of the land built a stable over the sewer:—*Held*, in an action by a local board, that there was no ground for a mandatory injunction to remove the building. Sandgate Local Board *v.* Leney 183, n.

—— Light - - - - - - 559
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ESTATE TAIL—After-acquired property of wife
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See Practice. 17. [673

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—— Report of surveyor - - - 472
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See Administration Action. 2.

EXPUNGING PROOF - - - 144
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EXPUNGING TRADE-MARK - - 194
See Trade-Mark.

FACTOR—*Lien—Restrictions placed by Principal on Powers of Factor.*] An agent who is entrusted with the possession of goods for the purpose of sale, does not lose his character of factor, or the right of lien attached to it, by reason of his acting under special instructions from his principal to sell the goods at a particular price and to sell in the principal's name. STEVENS *v.* BILLER [C. A. 31

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FOREIGN WILL—Unattested—Power of appointment - - - - - 373
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HOME FOR WORKING GIRLS—Restrictive covenant in lease - - - 206
See COVENANT.

HUSBAND AND WIFE—*Chattels Real of Wife not vested in Possession during Coverture—Reversionary Interest of Wife after Life Interest in Leaseholds for Years—Wife predeceasing Tenant for Life—Title of Husband surviving.*] A wife entitled to a term subject to a life estate therein predeceased her husband during the subsistence of the life estate:—*Held*, that it was not necessary for the husband to take out letters of administration to her in order to complete his title to the leaseholds. *In re* BELLAMY. ELDER *v.* PEARSON - - - - - - 620

—— Voidable marriage—Annuity to widow 685
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IMPLIED RESERVATION—Easement - 589
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INCOME—Trust estate—Expenses of action 710
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INCUMBRANCE—Discharge of—Conveyancing Act, 1881 - - - - 788
See VENDOR AND PURCHASER. 4.

INFANT—*Custody—Right of Mother—Breach of Marital Duty by Father—Infant Custody Act*, 1873 (36 & 37 *Vict. c.* 12), *s.* 1.] In determining whether the custody of an infant child ought to be given to or retained by the mother, the Court will take into consideration three matters—the paternal right, the marital duty, and the interest of the child.—For this purpose the marital duty includes, not only the duty which the husband and wife owe to each other, but the responsibility of each of them towards their children so to live that the children shall have the benefit of the joint care and affection of both father and mother. In a case where a father had committed a breach of the marital duty as thus defined:—*Held*, for this among other reasons, that the mother, in whose custody two children of the marriage of tender years were, ought to retain the custody until further order. *In re* ELDERTON - 220

2. —— *Ward of Court—Alien—Infant Member of Class mentioned in Title to Account.*] A fund was carried over in an administration action to a separate account, intituled "The account of A. B., and of X. Y., and his issue," to answer a settled legacy under the will of the testator, wherein A. B. and X. Y. had life interests.—X. Y. was a domiciled Frenchman, and he died leaving issue three daughters only, who were all French and married to Frenchmen, two of them having married under age, and one being still an infant. A. B. having also died, these three daughters and their husbands petitioned for payment out to them of their respective shares:—*Held*, that the Court would not in the exercise of its discretion treat the two daughters who had married under age as wards of Court.—*Semble*, the carrying of a fund to separate account of an infant in an action to which the infant is not a party will not constitute such infant a ward of Court, and even if such carrying over would have constituted a natural born British subject a ward of Court, it would not have that effect in the case of an alien not resident in this country.—Observations on *De Pereda* v. *De Mancha* (19 Ch. D. 451). BROWN *v.* COLLINS - - - 56

3. —— *Ward of Court—Infants Settlements Act* (18 & 19 *Vict. c.* 43)—*Settlement "upon" Marriage—Contempt—Form of Settlement—Power to enforce Settlement against Ward.*] A gentleman having, in wilful defiance of an order of the Court, married an infant ward of Court, the usual directions were given for a settlement of her property, and a settlement was prepared which provided that the power of testamentary appointment given to her in default of issue should not be exercised in favour of the husband. The wife objected to this exclusion of the husband, and to the proposed trustees, with whom she was not on friendly terms, and she refused to execute the settlement unless it was altered in these particulars. There was no objection to the trustees

INFANT—*continued.*
except her personal dislike to them. On an application in the matter of the infant and under the Infants Settlements Act (18 & 19 Vict. c. 43), Kay, J., made an order for the husband and wife to execute the settlement as it stood.—The wife appealed.—*Held*, by Earl Selborne, L.C., and Fry, L.J. (dubitante Cotton, L.J.), that under the Act 18 & 19 Vict. c. 43, a settlement of an infant's property may be made on the occasion of his or her marriage after the marriage has taken place. —*Held*, by Cotton and Fry, L.JJ. (absente Earl of Selborne, L.C.), that the wife ought not to be prevented from exercising in favour of her husband the power of testamentary appointment in default of issue, and that it was desirable not to appoint trustees with whom she was on unpleasant terms, and that the settlement ought to be modified in these respects; and the wife being willing to execute the settlement so modified, the Court declined to decide whether she could be compelled to execute it. *In re* Sampson and Wall, Infants - - - - - C. A. 482

—— Heir of mortgagor—Foreclosure - 158
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—— Next friend - - - - 243
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See Practice. 3.

—— Receiver in another action - - 723
See Practice. 21.

—— Trade circular—Infringement of patent 1
See Patent.

INTEREST—Covenant in mortgage deed—Merger in judgment - - - 338
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INTERIM INCOME—Legacy - - 743
See Will. 7.

INTERIM INJUNCTION—Trade circular—Infringement of patent - - 1
See Patent.

IRREGULARITY—Dismissal of motion—Non-production of affidavit of service - 84
See Practice. 14.

—— Service of inaccurate copy - - 112
See Bankruptcy. 3.

JUDGMENT—*Covenant—Merger—Mortgagor and Mortgagee—Costs—Liquidation Petition—Composition.*] A mortgage deed contained a covenant by the mortgagor for payment of the principal sum on the expiration of six months next after a specified day, together with interest thereon at 5 per cent. per annum for the six months. And there was a further covenant by the mortgagor that if the principal sum, or any part thereof, should remain unpaid after the expiration of the six months, the mortgagor would, so long as the same sum or any part thereof should remain unpaid, pay to the mortgagee interest for the principal sum, or for so much thereof as should for the time being remain unpaid, at 5 per cent. per annum. After the expiration of the six months, the mortgagee recovered judgment against the mortgagor on the covenant for the principal sum and interest in arrear.—*Held*, that, the covenant being merged in the judgment, the mortgagee

JUDGMENT—*continued.*
was, as from the date of the judgment, entitled only to interest on the judgment debt at the rate of 4 per cent., and was not entitled under the covenant to interest at the rate of 5 per cent. on the principal sum.—Decision of Bacon, C.J., reversed.—*Popple* v. *Sylvester* (22 Ch. D. 98) distinguished. *Ex parte* Fewings. *In re* Sneyd [C. A. 338

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—— Foreclosure action—Amendment - 750
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LANDLORD AND TENANT—Agreement for lease by mortgagor - - 678
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LANDOWNER—Abandonment of railway 251
See Railway Company.

LANDS CLAUSES ACT—*Compensation—Special Agreement—Occupier of House—Title—Metropolitan Streets Improvement Act*, 1877—*Personal Goodwill of Business—Mortgage—Evidence—Report of Surveyor.*] A public body acting under the powers of their Act and of the Lands Clauses Consolidation Act gave notice to the Plaintiff, who was a tailor, to take his house, which was leasehold. After some negotiation they offered him £400, of which £150 was to be apportioned to his leasehold interest and £250 to his trade damage and personal expenses, to which the Plaintiff agreed. The Plaintiff had mortgaged his leasehold interest and could not make a good title. The Plaintiff then brought an action for specific performance of the agreement, and the Defendants afterwards paid the £400 into Court under the 76th section of the Lands Clauses Act, executed a deed-poll, and took possession:—*Held* (affirming the decree of Bacon, V.C.), that the Plaintiff was entitled to judgment in the action, and to have the £250 paid at once to him, with interest from the time when the Defendants took possession.—Although in some cases the goodwill of trade premises passes to a mortgagee, that does not apply to a case where the goodwill depends on the personal skill of the owner.—A public body passed a resolution directing their solicitor to write a letter to the Plaintiff, the resolution being based upon the report of their own surveyor. The Plaintiff wished to put the report in evidence to shew the grounds for passing the resolution, and to explain the letter:—*Held*, that the report was not admissible. Cooper *v.* Metropolitan Board of Works - - - - C. A. 472

—— Compensation—Dwellings Improvement Act - - - - - 78
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—— Payment out of Court—Summons in Chambers.
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LEASE—Covenant in—Restrictive covenant 206
See COVENANT.

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LICENSE—Patent in two countries - 1
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LICENSEE—Trade-mark - - - 194
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LIEN—Factor - - - - 31
See FACTOR.

LIGHT — EASEMENT — *Implied Reservation — Notice—Building Scheme.*] J., upon land held by him under separate leases of the same date from the same freeholder, commenced the erection of a large building for the purposes of his drapery business. This building was so constructed that it was capable of being divided into separate blocks (A, B, C, &c.) substantially corresponding to the separate leases, but partly dependent on each other for light and for facilities of access from one floor to another, and other quasi easements. While the building was in course of erection J. mortgaged block C to X., who had notice of the general scheme of construction, and stipulated that J. should complete the part comprised in his mortgage in accordance with the plans; afterwards J. mortgaged block B to Y., and also mortgaged other blocks to other persons. J. subsequently became bankrupt, and orders nisi for foreclosure were on the same day obtained by X. and Y. against the trustee in bankruptcy and mesne incumbrancers. Y. first completed his foreclosure absolute, and X. did so shortly afterwards. The openings between the blocks were stopped up and the blocks became separately occupied:—*Held*, reversing the decision of Bacon, V.-C. (dissentiente. Lindley, L.J.), that there was no implied reservation of light to block B from the adjoining blocks, and that the owner of block B could not maintain an action to restrain X. from obstructing the light from block C:—*Held*, by Lindley, L.J., that the building of the several blocks was all one transaction, and that there was an implied grant of light to block B from the adjoining blocks. *Weeldon* v. *Burrows* (12 Ch. D. 31) followed. RUSSELL *v.* WATTS - - C.A. 559

LIQUIDATION—Member of company - 415
See COMPANY. 5.

—— Statement of debts—Interest - - 338
See BANKRUPTCY. 10.

LORD CAMPBELL'S ACT - - - 409
See DAMAGES.

LUNATIC—Tenant for life—Settled Land Act
See SETTLED LAND ACT. 2. [461

MARKET — *Disturbance — Injunction — Alleged Failure on part of Owners to provide Adequate Accommodation — Waiver of Statutory Rights — Illegality.*] Failure on the part of the lord of a market to afford sufficient accommodation for the public is not a defence to an action for disturbance by the setting up of a rival place of sale, although it is a defence to an action against a dealer who cannot find room in the market. In order to make a Defendant liable to an action for disturbance of a market it is not necessary to prove that he acted with the intention of defrauding the Plaintiffs of their tolls by taking advantage of the concourse at their market. A statute, or charter having the force of a statute, may be waived by the party for whose benefit it was enacted, so as to render the acts of persons disregarding it legal. A charter was granted by Edward III., with the advice of his Parliament, to the city of London, conferring certain privileges on the citizens, and granting that no market should be held within seven miles of the City. A charter was granted by Charles II., in 1682, to the Plaintiffs' predecessors in title, giving them the right to hold a market "in or next to S. Square," which was within seven miles of the City. User of the market was proved from 1723. The Plaintiffs built houses at S. Square, and let many of them for purposes unconnected with the market, and there was evidence that the market was very crowded, that it was difficult for dealers to get stalls there, and that substantially the whole market area was let by the year, month or week, leaving no space for the general public. The Defendants, who were a railway company, established a depôt or row of shops at their terminus, which was within 300 yards of S. Square, and let them to dealers for the purpose of selling vegetables brought up by their railway: the company also circulated their tenants' advertisements inviting consignments of produce; no persons were allowed to sell except the tenants of the shops. The Plaintiffs brought an action to restrain the Defendants from interfering with their market rights:—*Held*, that although the charter of Edward III. had the force of an Act of Parliament, the Corporation of London might waive their rights as to the establishment of markets, and that the Court would presume that they consented to the charter of 1682. *Held*, also, that the depôt of the Defendants, although not technically a market, was a disturbance of the Plantiffs' rights, and made them liable to an injunction: and that even if the Plaintiffs' mode of conducting their market would preclude them from maintaining an action against a tenant of the Defendants, yet it did not preclude them from bringing an action against the Defendants to restrain them from establishing a rival place of sale in the neighbourhood.—*Islington Market Case* (12 M. & W. 20, n.; 3 Cl. & F. 513) and *Prince* v. *Lewis* (5 B & C. 363) considered. GOLDSMID *v.* GREAT EASTERN RAILWAY COMPANY - C. A. 511

MARRIAGE SETTLEMENT - - 200, 611
See SETTLEMENT. 1, 2.

MARSHALLING—Securities—Bankruptcy 148
See BANKRUPTCY. 7.

MEASURE OF DAMAGES — Abandonment of railway—Landowner - - 251
See RAILWAY COMPANY.

MEDICAL OFFICER — Action by—Consent of Charity Commissioners - - 39
See CHARITY. 1.

MEETING OF CREDITORS — Bankruptcy — Scheme of arrangement - - 266
See BANKRUPTCY. 4.

MEMORANDUM OF ASSOCIATION—Subscriber [283
See Company. 4.

METER—Waterworks company - - 443
See Waterworks Company. 2.

METROPOLITAN STREET IMPROVEMENT ACT—Compensation - - - 472
See Lands Clauses Act.

MISLEADING CONDITION - - - 357
See Vendor and Purchaser. 3.

"**MONEY**"—Bequest of "the money of which I am possessed." - - - 154
See Will. 8.

MORTGAGE—*Contract—Costs and Expenses—Right of Action against Mortgagor.*] Costs and expenses properly incurred by a mortgagee in relation to the mortgaged property, and which the mortgagor will be compelled to pay as a condition of being allowed to redeem the property, do not constitute a debt in respect of which an action can be maintained by the mortgagee against the mortgagor. *Ex parte* Fewings. *In re* Sneyd - - - - C. A. 338

2. —— *Foreclosure—Costs of Abortive Sale—Cheque for Deposit dishonoured—Practice of Auctioneers—Personal Order for Payment—Form of Order.*] The custom of auctioneers to accept, on sales of large properties, a cheque in lieu of cash for the deposit, is reasonable, and a mortgagee-vendor was held to be justified in acting on it, and not to be guilty of negligence in the conduct of the sale, though the cheque was dishonoured.—In such a case a mortgagee, who has endeavoured to sell under his powers, is entitled to add the costs of the abortive sale to his security.—The proper order in a foreclosure action, when an account and an order for personal payment of what may be found due is asked for against the mortgagor, is to direct payment of principal and interest within one month after the date of the Chief Clerk's certificate on the taking of the accounts.—*Semble*, if a mortgagee wants an immediate order for personal payment, he must ask for it by his pleadings and prove the amount due for principal and interest at the trial. Farrer *v.* Lacy, Hartland & Co. - - - - 636

3. —— *Foreclosure — Costs — Redemption.*] The plaintiff in a foreclosure action is as a general rule entitled to an account of only principal and interest due to him on his mortgage, and of the costs of the action. To entitle him to an account of any other costs he must make out a special case.—But, where the Plaintiff was the transferee of a mortgage, on which interest was overdue at the date of the transfer, and the mortgagor was a bankrupt:—*Held*, that the Plaintiff was entitled to an account of costs generally. Bolingbroke *v.* Hinde - - - - - 795

4. —— *Foreclosure — Equitable Mortgage—Mortgagor's Estate in infant Heir-at-Law—Day to shew Cause—Form of Decree.*] In an action by an equitable mortgagee, without any memorandum of deposit of title deeds, against the widow and infant heir-at-law of the mortgagor for foreclosure:—*Held*, on motion for juddment, the Defendants not having appeared, that the infant heir must be ordered to convey the estate when he attained the age of twenty-one years, and that

MORTGAGE—*continued.*

he must have a day to shew cause in the usual way.—*Price* v. *Carver* (3 My. & Cr. 157) followed. Mellor *v.* Porter - - - - - 158

5. —— *Foreclosure—Receipt of Rents by Mortgagee before Final Judgment—Opening Foreclosure—Further Account.*] In an action by executors of a mortgagee against the mortgagor and a puisne mortgagee an order nisi for foreclosure was made, giving successive periods of redemption. After the time fixed for redemption and before final judgment was obtained against the puisne mortgagee, and before the expiration of the time allowed to the mortgagor, the Plaintiffs received a sum of money for rent. A further account had been taken against the mortgagor, and a further day fixed for redemption by him:—*Held*, that it was irregular to fix a further time for the mortgagor to redeem until the puisne mortgagee had been finally foreclosed; and that the receipt of moneys for rent after the time fixed for the puisne mortgagee to redeem and before final judgment obtained against him did not open the foreclosure against him.—The order was to foreclose the puisne mortgagee absolutely, and to take a further account against the mortgagor. Webster *v.* Patteson - - - - - 626

6. —— *Foreclosure Action — Receiver—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8 —*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 19, *sub-s.* 3.] A legal mortgagee being in possession of the mortgaged property, applied to the Court for the appointment of a receiver:—*Held*, that although the mortgagee might, under the Conveyancing Act, 1881, appoint a receiver without coming to the Court, it was more desirable, where an action was pending, that the appointment should be made by the Court under the Judicature Act, 1873. Tillett *v.* Nixon 238

7. —— *Foreclosure Decree—Right of Defendant to insist on Plaintiff bringing in Accounts—Practice — Amendment of Form of Summons.*] Mortgagees for the term of a colliery brought an action for foreclosure, seeking declarations that the original mortgage deed was a good exercise of a power of leasing, and that the sums secured by a later deed were also charged on the term created by the first deed. They obtained a decree giving them the declarations asked, and directing the usual accounts in the case of mortgagees in possession, with directions for foreclosure in default of payment. A summons was taken out by the Defendants to proceed with the judgment, and the chief clerk directed the Plaintiffs to bring in their accounts by a certain day, but no order to that effect was drawn up. The Plaintiffs afterwards having refused to bring in their accounts on the ground that, as they alleged, the moneys remaining due to them were many times more than the value of the mortgaged property, and that taking the accounts would therefore be useless, the Defendants applied on summons for an order that the Plaintiffs might bring them in in four days, not asking any alternative relief. Pearson, J., refused the application on the ground that the Defendants were not entitled to a four-day order. The Defendants appealed:—*Held*, that the summons must be treated as if it had been asked that the Plaintiffs might bring in

MORTGAGE—*continued.*
their accounts in four days, or in such other time as the Court might think fit, the summons if necessary, being amended:—*Held*, that as the Plaintiffs had taken a foreclosure decree, the Defendants were entitled to have the accounts brought in, but that the order should be prefaced with a statement that they required them to be brought in.—Whether this statement would give the Court jurisdiction as to the costs if it turned out that the accounts had been asked for vexatiously and unreasonably, *quære*.—Whether the Court would not on a substantive application by the Plaintiffs stay the taking the accounts if it was satisfactorily shewn that taking them would be useless, *quære*. TAYLOR *v.* MOSTYN C. A. 48

8. —— *Foreclosure Action—Practice—Several Defendants—Time for Redemption.*] Where there were two Defendants to a foreclosure action—the mortgagor and a second mortgagee who had joined in the Plaintiff's security to postpone his previously prior right, and as surety for the Plaintiff:—*Held*, that only one period of six months should be allowed for redemption by both Defendants.—*Bartlett* v. *Rees* (Law Rep. 12 Eq. 395) and *General Credit and Discount Co.* v. *Glegg* (22 Ch. D. 549) followed. SMITH *v.* OLDING 462

9. —— *Foreclosure Action — Several Defendants—Successive Periods of Redemption.*] In an action for foreclosure by first mortgagees against a second mortgagee and the mortgagor:—*Held*, that successive periods for redemption ought to be allowed to the Defendants. SWEET *v.* COMBLEY [463, n.

10. —— *Mortgagee in Possession—Lease subsequent to Mortgage—Notice by Mortgagee to Tenant to pay Rent to him.*] C., the owner of a leasehold estate which was subject to a mortgage, entered without the privity of the mortgagees into an agreement with P. to grant him a lease for twenty-one years, and in 1875 P. took possession under this agreement. On the 25th of March, 1881, the mortgagees' solicitors wrote to P. stating that they, on behalf of the mortgagees, had withdrawn C.'s authority to receive the rents and asking him to pay the rent due that day and all future rent to them. P. wrote to ask C. whether he ought to pay according to the notice, and C. replied that he would be correct in doing so. P. consulted his solicitors, who inspected the mortgage deed, and advised him that the mortgagees could claim rent from him. P. therefore paid the mortgagees the rent due on the 25th of March, and on the 22nd June gave them notice to determine his tenancy at Christmas. At the end of the year the mortgagees refused to accept possession, and in June, 1882, they and C. commenced this action to compel P. to take a lease according to the agreement:—*Held*, affirming the decision of Pollock, B., that the notice by the mortgagees to the tenant to pay rent to them and the payment accordingly did away with the agreement between C. and P. and made P. tenant from year to year to the mortgagees, and that specific performanee of the agreement could not be decreed. CORBETT *v.* PLOWDEN - - - - - 678

—— Foreclosure—Amendment after judgment
See PRACTICE. 2. [750

MORTGAGEE IN POSSESSION—Agreement for lease by mortgagor - - 678
See MORTGAGE. 10.

MOTHER—Right to custody of child - 220
See INFANT. 1.

MOTION—Dismissal of—Affidavit of service 84
See PRACTICE. 14.

—— For attachment - - - - 64
See PRACTICE. 4.

—— For judgment—Counter-claim - 68
See PRACTICE. 12.

MUTUAL CREDIT—Bankruptcy - - 716
See BANKRUPTCY. 9.

NATIONAL DEBT COMMISSIONERS—*Petition for re-Transfer of Stock—Dismissal of former Petition by same Petitioner—Res Judicata—Discovery of Fresh Evidence—National Debt Act*, 1870 (33 & 34 *Vict. c.* 71), *ss.* 51, 54, 55.] The jurisdiction given to the Court by sect. 55 of the National Debt Act, 1870, to decide upon petition as to the validity of a claim for the re-transfer of stock, which has been transferred to the National Debt Commissioners under the provisions of sect. 51, is to be exercised in the mode in which the ordinary jurisdiction of the Court is exercised.—Therefore, if a petition for the re-transfer of stock is heard on its merits, and is dismissed on the ground that the Petitioner has failed to make out his title, he cannot, on the subsequent discovery of fresh evidence in support of his title, present a fresh petition for the same object, at any rate without the leave of the Court previously obtained. *In re* MAY - - - 231

NEGLIGENCE—Director - - - 752
See COMPANY. 3.

NEW TRUSTEES—Appointment—Settled Land Act - - - - - 595
See SETTLED LAND ACT. 4.

—— Power to appoint - - - 611
See SETTLEMENT. 2.

NEXT FRIEND - - - - 243
See PRACTICE. 19.

NON-PROFESSIONAL WORK - - 279
See SOLICITOR. 1.

NOTARY—Foreign country—Modern practice
See PRACTICE. 16. [769

NOTICE—Injunction—Committal for breach 778
See PRACTICE. 3.

—— Third party procedure—Co-Defendant 76
See PRACTICE. 24.

—— To trustees—Settled Land Act - 464
See SETTLED LAND ACT. 2.

—— To treat—Dwellings Improvement Act 78
See DWELLINGS IMPROVEMENT ACT.

NOVATION—Company—Promoter - 103
See COMPANY. 1.

NUISANCE — *Railway Company — Powers.*] A railway company were by their Act empowered to purchase (besides the lands as to which they had compulsory powers) any lands not exceeding in the whole fifty acres for the purpose of making additional station yards for cattle and for other purposes, and were also empowered to carry cattle (amongst other things). The company accord-

NUISANCE—*continued.*
ingly purchased a piece of land adjoining one of their stations, and used it for unloading cattle. The noise of the cattle and drovers was a nuisance to the occupiers of certain houses near the station; and they brought an action to restrain the company accordingly:—*Held*, that as the company were not obliged by their Acts to carry cattle or to have a station for cattle, and had not shewn that this was the only available place for such a station, they had no power to create a nuisance at this place; and an injunction was granted with damages.—*Hammersmith Railway Company* v. *Brand* (Law Rep. 4 H. L. 171) distinguished, and *Managers of Metropolitan Asylum District* v. *Hill* (6 App. Cas. 193) discussed. Truman *v.* London, Brighton, and South Coast Railway Company - - - - - 423

OCCUPIER—Lands Clauses Act—Compensation
See Lands Clauses Act. [472

OFFICIAL REFEREE - - - 772
See Practice. 25.

OPENING FORECLOSURE - - - 626
See Mortgage. 5.

ORDER FOR SALE—Conversion - - 735
See Administration Action. 1.

PARTIES—Third party - - - 76
See Practice. 24.

PARTNERSHIP—*Articles—Contract for Benefit of Third Party — Right to enforce — Trust — Covenant to pay Annuity for Benefit of Widow of deceased Partner.*] Articles of partnership between two solicitors provided that the partnership should be for the term of ten years from the 1st of May, 1875, if both the partners should so long live. The partnership was also made determinable by notice. There was a further provision that from the determination of the partnership the retiring partner, his executors or administrators, or the executors or administrators of the deceased partner, should be entitled to receive out of the net profits of the partnership business, during so much (if any) of the term of five years from the 1st of May, 1880, as should remain after the determination of the partnership, the yearly sum of £350, and during so much (if any) of the term of five years from the 1st of May, 1885, as either the retiring partner, or a widow of the retiring or deceased partner, should be living, the yearly sum of £250, any sum which might under this provision for the time being become payable to the executors or administrators of a deceased partner to be applied in such manner as such partner should by deed or will direct for the benefit of his widow and children, and in default of such direction to be paid to such widow, if living, for her own benefit. It was further provided that the annuity should, so far as legally might be, be constituted a charge on the net profits of the business. One of the partners died in 1883, leaving a widow, but without having given any direction as to the application of the annuity. By his will he appointed his widow his universal legatee and sole executrix. He died insolvent, and an action was brought by the creditor to

PARTNERSHIP—*continued.*
administer his estate:—*Held*, by North, J., and by the Court of Appeal, that the annuity did not form part of the testator's estate, but that by the articles a trust of it was created in favour of the widow, and that she was entitled to it free from the claims of the testator's creditors. *In re* Flavell. Murray *v.* Flavell - C. A. 89

—— Administration action against estate of deceased partner - - - 16
See Practice. 11.

—— Bankruptcy—Proof by partner - 505
See Bankruptcy. 8.

—— Fraudulent pledge—Liability of innocent partner - - - - 148
See Bankruptcy. 7.

—— Production of documents — Sealing up entries - - - - 247
See Practice. 20.

PATENT—*License—Foreign Patent—Right to sell Articles in England—Interim Injunction—Circular warning against Infringement of Patent—Balance of Convenience.*] The Defendants, who were the owners of patents in Belgium and England for an invention for making glass lamp globes, by a deed executed in Belgium granted a license to the Plaintiffs to manufacture articles under their invention in Belgium, but not elsewhere. The deed contained a clause for submitting disputes to arbitration. The Plaintiffs under this license manufactured articles in Belgium and sold them in England. The Defendants issued a circular warning persons engaged in the trade that the importation and sale of articles made in foreign countries under their invention, except by themselves, would be a violation of their patent. The Plaintiffs brought an action to restrain the issue of this circular until the matters in dispute had been determined by arbitration.—*Held* (affirming the decision of Pearson, J.), that the grant of the license to use the patent in Belgium did not imply permission to sell the manufactured article in England in violation of the Defendants' English patent.—*Betts* v. *Willmott* (Law Rep. 6 Ch. 239) distinguished.—Where a trade circular is issued bonâ fide, an interim injunction will not be granted to restrain it unless it is in violation of some contract between the Plaintiff and Defendant, however much the balance of convenience may be in favour of granting. Société Anonyme des Manufactures de Glaces *v.* Tilghman's Patent Sand Blast Company - C. A. 1

—— Infringement—Injunction - - 778
See Practice. 3.

PAYMENT—Appropriation—Guarantee - 692
See Principal and Surety.

PAYMENT OUT OF COURT—Lands Clauses Act—Summons in Chambers.
See Cases under Practice. 5—8.

PENDING PROCEEDINGS—Administration action—New practice—Reference to Chambers
See Practice. 10. [66

—— Default in pleading—New practice - 68
See Practice. 12.

—— Voluntary winding-up—Transfer of shares
See Company. 7. [118

PERCENTAGE—Remuneration of solicitor 301
See Solicitor. 2.

PERPETUITY—Power of re-entry - - 629
See Vendor and Purchaser. 2.

"PERSON AGGRIEVED" - - - 194
See Trade-mark.

PERSONÆ DESIGNATÆ - - - 162
See Will. 5.

PETITION—Re-transfer of stock—National Debt Commissioners - - - 231
See National Debt Commissioners.

POWER—*Valid Exercise by Will—Subsequent Bargain by Appointor with Appointee—Fraud on Power—Unattested Codicil—Wills Act* (1 *Vict. c.* 26), *ss.* 9, 10—24 & 25 *Vict. c.* 114.] The donee of a power of appointment amongst his children, exercisable by deed or will, having one son and one daughter, by will in 1862 made a valid appointment to the daughter of the whole fund subject to the power. By a French settlement, not under seal, made in 1866, upon the marriage of his daughter he purported to appoint the whole fund to her, reserving to himself the power of disposing of a life interest in a portion of the fund in favour of his second wife; and by a holograph codicil, dated in 1871, made in France, and unattested, after reciting an arrangement made when his daughter was married between himself, his daughter, and her intended husband, that such second wife should have such provision, he in effect appointed that if his daughter and her husband should carry out this arrangement they should have the whole of the fund. This codicil was admitted to probate under 24 & 25 Vict. c. 114.—*Held*, that though admitted to probate the codicil was invalid as a testamentary exercise of the power (sects. 9 and 10 of the Wills Act not being repealed by 24 & 25 Vict. c. 114) and did not revoke the appointment by will.—*Held*, also, that the codicil could not be treated as a defective attempt to exercise the power by deed which the Court would aid.—*Held*, also, that the appointments by the settlement and codicil were frauds upon the power.—*Held*, also, that the arrangements made by the settlement and codicil involved a threat to revoke the will if they were not carried into effect, and that consequently the will, being an ambulatory instrument, was vitiated and became a fraud upon the power, although at the date of its execution it was not open to objection.—Observations on *Kennard* v. *Kennard* (Law Rep. 8 Ch. 227). *In re* Kirwan's Trusts 373

—— Of sale—Mortgage—Abortive sale - 636
See Mortgage. 2.

—— Of sale—Settled Land Act.
See Cases under Settled Land Act.

—— To appoint new trustees - - 611
See Settlement. 2.

PRACTICE—*Admissions between co-Defendants—Rules of Court*, 1883, *Order* xxxii., *r.* 2.] Admissions between co-Defendants under Rules of Supreme Court, 1883, Order xxxii., r. 2, to which the Plaintiff is not a party, cannot be entered as evidence against the Plaintiff, and therefore cannot be included in an order for taxation and payment of the general costs of the action. Dodds *v.* Tuke - - - - - 617

PRACTICE—*continued.*

2. —— *Amendment—Action for Foreclosure—Judgment, not drawn up and entered—Discovery of Puisne Mortgagees—Rules of Supreme Court*, 1883, *Order* xvi., *r.* 11—*Leave to amend by adding Defendants.*] Where judgment in a foreclosure action had been pronounced, but had not been drawn up and entered, and it was discovered that there were puisne mortgagees, leave was given under Rules of Supreme Court, 1883, Order xvi., rule 11, to amend the writ and statement of claim by making the puisne mortgagees defendants. Keith *v.* Butcher - - 750

3. —— *Attachment—Breach of Injunction—Non-service of Order—Notice to Defendant—Patent—Infringement—Sale of component Parts of patented Invention separately.*] In order to justify the committal of a defendant for breach of an injunction it is not necessary that the order granting the injunction should have been served upon him, if it is proved that he had notice of the order aliunde, and knew that the plaintiff intended to enforce it.—This rule is not limited to cases in which a breach is committed before there has been time for the plaintiff to get the order drawn up and entered.—*James* v. *Downes* (18 Ves. 522) and *Vansandau* v. *Rose* (2 Jac. & W. 264) discussed and explained:—*Semble*, that an injunction granted to restrain the sale of a complete machine, the subject of a patent, will be violated by a sale of the component parts of the machine in such a way that they can easily be put together by any one. United Telephone Company *v.* Dale - - - - - - 778

4. —— *Attachment—Disobedience to Order for Discovery—Motion to commit—Omission to serve Copy of Affidavit with Notice of Motion—Rules of Supreme Court*, 1883, *Order* xxxi., *r.* 21; *Order* lii., *r.* 4.] On giving a notice of motion to commit a defendant for contempt in disobeying an order for discovery, the Plaintiffs omitted to serve with the notice of motion a copy of an affidavit which they stated in the notice that they should read in support of the motion:—*Held*, that rule 4 of Order lii. applied to such a notice of motion, and not only to a case in which a writ of attachment would have issued under the old Common Law practice, and that the notice of motion was, therefore, irregular.—But, *held*, that the motion should not be at once dismissed, but should be ordered to stand over until after the hearing of a summons by the Defendant for further time to make the discovery. Litchfield *v.* Jones 64

5. —— *Chambers—Chancery Division—Application for Payment out of Court—Money paid in under Lands Clauses Consolidation Act*, 1845—*Sum under* £1000—*Rules of Supreme Court*, 1883, *Order* lv., *r.* 2, *sub-ss.* 2, 6, 7.] An application for the payment or transfer out of Court to a person absolutely entitled of a fund of less amount than £1000 paid into Court under the Lands Clauses Act is governed by sub-sect. 2 of rule 2 of Order lv., and ought now to be made by summons in Chambers. *In re* Calton's Will 240

6. —— *Chambers—Payment out of Court—Lands Clauses Consolidation Act*, 1845—*Deposit in Court—Fund not exceeding* £1000—*Petition or Summons—Rules of Supreme Court*, 1883, *Order*

PRACTICE—*continued.*

Lv., r. 2, sub-ss. 2–7—Railway Company—Payment out to Third Person — Company's Seal.] The general expressions of sub-sect. 2 of Order Lv., rule 2 (Rules of Court, 1883), are not to be construed as in any way qualified or modified by the subsequent sub-sections. Therefore, an application by a landowner and a railway company for payment out of a sum not exceeding £1000 deposited in Court under sect. 85 of the Lands Clauses Consolidation Act, 1845, should be made by summons in Chambers and not by petition.—Any such summons asking for payment out to a person on behalf of the company, should be sealed with the company's seal, by analogy to the practice on petition. *Ex parte* Maidstone and Ashford Railway Company. *Ex parte* Bala and Festiniog Railway Company - - - 168

7. —— *Chambers—Payment out of Court—Petition or Summons—Fund exceeding* £1000*—Lands Clauses Consolidation Act*, 1845*—Rules of Supreme Court*, 1883, *Order Lv., r. 2, sub-s. 1.*] Freehold hereditaments in the city of London, to a moiety of which A. B. was entitled after the death of a tenant for life, subject to four life annuities of £50 payable from the death of the tenant for life, were taken by the Metropolitan Board of Works, and the money paid into Court under the Lands Clauses Act, 1845. In 1866 an order was made on petition, whereby a sum of £7000 was ordered to be invested to provide for the annuities when they should become payable, and the balance of a moiety of the fund, after providing for the tenant for life's interest, was directed to be paid to A. B. In 1868 one of the expectant annuitants died; in 1869 the tenant for life died and in 1870 another order was made on petition, whereby a sum of stock which would have been sufficient to pay an annuity of £50, was ordered to be transferred to A. B.—A second annuitant having died in May, 1883, A. B. claimed a sum of £1666 13*s.* 4*d.* consols, being so much of the residue of the investment of £7000 as had sufficed to provide for the second annuity of £50. —*Held*, that the orders of the Court in 1866 and 1870, amounted to "an order declaring the rights of" A. B. within the meaning of sub-sect. 1 of rule 2 of Order Lv. of 1883; and that the application ought to be by summons.—The generality of sub-sect. 1 of rule 2 of Order Lv. is not cut down or qualified by sub-sect. 7 or any of the sub-sections of rule 2 following sub-sect. 1. *In re* Brandram - - - - - 366

8. —— *Chambers—Payment out of Court—Petition or Summons—Sum not exceeding* £1000 *—Lands Clauses Consolidation Act*, 1845*—Rules of Supreme Court*, 1883, *Order Lv., r. 2, sub-s. 2.*] An application for payment out of Court to a person absolutely entitled of a sum of cash not exceeding £1000 paid in under the Lands Clauses Consolidation Act, 1845, is rightly made by summons, not by petition. *In re* Madgwick - 371

9. —— *Chambers—Re-investment of Moneys paid into Court under Lands Clauses Act*, 1845*—Application by Summons in Chambers—Judicature Acts*, 1873, *ss.* 16, 24, 73; 1875, *s.* 17; *Appellate Jurisdiction Act*, 1876, *s.* 17; *Judicature Act*, 1881, *s.* 19—18 *& 19 Vict. c.* 134, *s.* 16—*Rules of Supreme Court*, 1883, *Order Lv., r. 2, sub-s. 7, not ultrà vires.*] The 16th section of the Despatch of Business, Court of Chancery, Act (18 & 19 Vict. c. 134), giving power to the Lord Chancellor, with the advice and assistance of the Master of the Rolls and the Vice-Chancellors, or any two of them, to make general orders as to the business to be disposed of in Chambers, has not been repealed either expressly or by implication; and the effect of the 76th section of the Judicature Act of 1873 was to substitute three Judges of the High Court of Justice for the three Vice-Chancellors mentioned in such 16th section.—Accordingly such power may now be properly exercised by the Lord Chancellor, with the advice and assistance of the Master of the Rolls, and any two Judges of the High Court of Justice, and the fact that the Rule Committee who framed the Rules of the Supreme Court, 1883, comprised other Judges as well as these, does not invalidate the exercise of the power.—Therefore it appearing from the reference in Order Lv., rule 2, sub-sect. 7, to the 14th of August, 1855, the date on which the Despatch of Business, Court of Chancery Act, received the royal assent, that the Rule Committee intended to act under the powers conferred by that Act, the order contained in such sub-section is not ultrà vires, and in accordance therewith all applications for interim and permanent investments and for payment of dividends under the Lands Clauses Consolidation Act, 1845, and any other Act passed before the 14th of August, 1855, whereby the purchase-money of any property sold is directed to be paid into Court, must be made upon summons at Chambers. *Ex parte* Mayor of London [384

10. —— *Chambers—Reference to Chambers—Administration Action—Action commenced before the 24th of October*, 1883 *— Rules of Supreme Court*, 1883, *Order Lv., r.* 10.] Rule 10 of Order Lv. of the Rules of the Supreme Court, 1883, applies to an administration action commenced before, but tried after, those rules came into operation.—An order was therefore made referring such an action to Chambers to determine whether it was necessary that a general administration of the estate should be directed. *In re* Llewellyn. Lane *v.* Lane - - 66

11. —— *Conduct of Proceedings—First Action defective—Action by Joint Creditors for Administration of Separate Estate of deceased Partner.*] A creditor of a partnership firm brought an administration action against the executor of a deceased partner. Afterwards a separate creditor of the same partner brought an administration action against the executor, and obtained judgment:—*Held*, on an application by the Plaintiff in the first action for the conduct of the proceedings in the second action, that a joint creditor of a firm could not maintain a simple action for the administration of the estate of a deceased partner, and therefore that the first action was not properly constituted. The application of the Plaintiff was consequently refused.—Decision of Kay, J., affirmed. *In re* McRae. Forster *v.* Davis. Norden *v.* McRae C. A. 16

12. —— *Default of Pleading to Counter-claim —Motion for Judgment—Rules of Supreme Court*, 1883, *Order xxiii., r.* 4; *Order xxvii., rr.* 11, 12.]

PRACTICE—*continued.*

Order XXIII., rule 4, and Order XXVII., rules 11, 12, of the Rules of 1883, apply when a motion for judgment in default of pleading is made after, although the default itself was made before, they came into operation.—And these rules apply to a case where a defendant to a counter-claim has made default in pleading to it, and entitle the plaintiff in the counter claim to move for judgment against the defaulting defendant. STREET *v.* CRUMP - - - - - - 68

13. —— *Default of Pleading—Judgment—Defence delivered before Judgment — Rules of Court*, 1875, *Order XXIX., r.* 10—*Amendment of Notice of Motion by Court of Appeal—Rules of Supreme Court*, 1883, *Order LVIII., r.* 4.] A Defendant made default in putting in a statement of defence under Order XXIX., r. 10 (1875), and the Plaintiff gave notice of motion for judgment in default of defence. But before the motion was heard the Defendant put in a statement of defence:—*Held*, that the statement of defence, though put in after time, could not be treated as a nullity, and that the Plaintiff was not entitled to judgment in default of defence.—But as the statement of defence disclosed no real defence to the action, the Court of Appeal ordered the notice of motion to be amended and judgment to be given for the Plaintiff on the admissions in the statement of defence. GILL *v.* WOODFIN C. A. 707

14. —— *Dismissal for want of Prosecution—Motion — Affidavit of Service.*] An order dismissing an action for want of prosecution was made subject to production of an affidavit of service, no one appearing for the Plaintiff. Shortly afterwards counsel appeared for the Plaintiff, but the Judge refused to have the case argued. No affidavit of service was sworn or filed until after the day on which the motion was made. The Registrar drew up the order on production of an office copy of an affidavit of service sworn and filed after that day, omitting in the order the date of the affidavit. It appeared that since the passing of the Judicature Acts the rule in *Lord Milltown* v. *Stuart* (8 Sim. 34) had not been uniformly observed by the Registrars:—*Held*, that, assuming the drawing up of the order on an affidavit sworn and filed after the day on which the motion was made to be irregular, the irregularity was not such that the Court ought on that ground to discharge the order. SEEAR *v.* WEBB [C. A. 84

15. —— *Evidence—Affidavit—Cross-examination—Expenses of producing Affidavit Witness for Cross-examination—Rules of Court*, 1875, *Order XXXVIII., r.* 4.] The provision in Rules of Court, 1875, Order XXXVIII., rule 4, that the party producing deponents for cross-examination upon their affidavits shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, is confined to a cross-examination of the deponents before the Court at the trial of the action, and does not apply to a cross-examination on an affidavit filed after decree for the purpose of proceedings in Chambers.—Decision of Bacon, V.-C., reversed. *In re* KNIGHT. KNIGHT *v.* GARDNER - - - C. A. 297

16. —— *Evidence—Affidavit—Foreign Country—Notary Public—Consul*—15 & 16 *Vict. c.* 86, *s.* 22—*Court of Probate Act*, 1858 (21 & 22 *Vict. c.* 95), *s.* 31—*Rules of Supreme Court*, 1883, *Order XXXVIII., r.* 6; *Order LXXII., r.* 2.] Before and after the Act 15 & 16 Vict. c. 86, affidavits sworn in foreign parts out of Her Majesty's dominions before a notary public might be filed, and that practice continued in force down to the time when the Rules of the Supreme Court, 1883, came into operation.—*Held*, that this practice is not abrogated by Order XXXVIII., r. 6, and Order LXXII., r. 2, of the Rules of 1883, and may be followed at any rate in cases where the practice under the Rules of 1883 would be very inconsistent. COOKE *v.* WILBY - - - - - - 769

17. —— *Evidence — Commission to examine Witnesses abroad—Rules of Supreme Court*, 1883, *Order XXXVII., r.* 5.] If it is shewn that there are material witnesses resident abroad whom a party wishes to examine, a commission to examine them abroad will be granted if there is any reasonable ground for their not coming here, unless a case is made shewing that it is necessary for the purposes of justice that they should be examined in England. ARMOUR *v.* WALKER [C. A. 673

18. —— *Evidence—Special Examiner—Examination of Parties to the Suit—Rules of Court*, 1875, *Order XXXVII., r.* 4—*Rules of Supreme Court*, 1883, *Order XXXVII., r.* 5.] A Plaintiff residing in New Zealand brought an action for redemption alleging himself to be the heir-at-law of a person who had died intestate entitled to a remainder in fee in the equity of redemption which had fallen into possession since his death. The Plaintiff's case was that he had been long resident in New Zealand and had had no communication with his family since 1860, and had only been recently informed of his title. The Defendant was a person to whom the property had been sold by a person whose elder brother the Plaintiff alleged himself to be. The Defendant did not dispute the Plaintiff's right to redeem if he was the person he represented himself to be, but required proof of his identity. The Plaintiff applied for a commission to examine himself, two persons named and others residing in New Zealand. Mr. Justice Kay made the order, and directed that the depositions might be given in evidence at the trial "without prejudice to the right of the Defendant to cross-examine the Plaintiff at the trial in the presence of witnesses in England who can speak to his identity." The Defendant appealed from the order:—*Held*, that there was jurisdiction to appoint examiners for the examination of a party to the cause as well as of a mere witness:—But, *held*, that the deposition of the Plaintiff ought not to be admitted at the trial if the Defendant required him to appear at the trial to be examined and cross-examined, it not being shewn that there was any practical impossibility of his attending:—*Held*, further, that the order need not be confined to witnesses mentioned in it by name, but that the Plaintiff must give notice to the other side in New Zealand of the witnesses he proposed to call. NADIN *v.* BASSETT C. A. 21

19. —— *Next Friend of Infant.*] Doubts having arisen as to the proper custody of an

PRACTICE—*continued.*

infant, a suit was commenced in her name for the administration of her father's estate. A next friend was appointed who was a friend of the Defendants, the executors and trustees of the will, and guardians of the infant, and accepted the office at their request, and on an indemnity from their father. The solicitors on the record for the Plaintiff were the solicitors of the executors. On an application in the name of the infant by M., the husband of her paternal aunt, as next friend pro hâc vice, to remove the next friend and substitute M.:—*Held*, reversing the decision of Bacon, V.C., that although nothing was alleged against the character, circumstances, or conduct of the next friend, his connection with the executors made him an improper person to act as next friend, and that he ought to be removed and M. substituted. *In re* Burgess. Burgess *v.* Bottomley - - **C. A. 243**

20. —— *Production of Documents—Sealing up Entries—Partnership Books—Surviving Partner.*] The Defendant and W. P. were partners. W. P. died and appointed the Defendant his executor. In an action by a person interested under W. P.'s will against the Defendant a decree was made for administration of W. P.'s estate, and for taking accounts of the partnership as between the Defendant as surviving partner and W. P.'s estate. An order having been made for the production of the partnership books by the Defendant, he claimed to seal up such entries as related to his own private affairs:—*Held* (affirming the decision of Chitty, J.), that inasmuch as the Plaintiff and Defendant were both interested in the partnership property, the Defendant was not entitled to the ordinary power to seal up such entries as he might swear to be irrelevant to the matters at issue in the action, but only to seal up entries which related to certain specified private matters mentioned in the order. *In re* Pickering. Pickering *v.* Pickering **C. A. 247**

21. —— *Receiver—Action to restrain Receiver appointed in another Action — Judicature Act*, 1873, *s.* 24, *sub-ss.* 5, 7.] A person who is prejudiced by the conduct of a receiver appointed in an action by way of equitable execution, ought not without leave of the Court to commence a fresh action to restrain the proceedings of the receiver, even though the act complained of was beyond the scope of the receiver's authority; but ought to make an application for such relief as he is entitled to in the action in which the receiver was appointed. Searle *v.* Choat [**C. A. 723**

22. —— *Receiver — Equitable Execution — Debts and Sums of Money—Judgment Debtor—Judgment Creditor—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Rules of Supreme Court*, 1883, *Order* L., *r.* 6.] Since the Judicature Acts the Court can grant equitable execution by the appointment of a receiver at the instance of a judgment creditor against debts and sums of money payable to the judgment debtor to which garnishee proceedings are not applicable. Westhead *v.* Riley - - - - **413**

23. —— *Staying Proceedings—Second Suit for same Matter—Costs of former Suit.*] A bill for an account of the personal estate of W. J., an intestate, was filed by the legal personal representative of E. B. against the personal representatives of the deceased administrators of W. J., alleging that the administrators of W. J. had got in the greater part of the estate, and that E. B. was the sole next of kin. The suit was revived in 1877 by M., a subsequent personal representative of E. B., against X. and Y., as representatives of one of the administrators, and Z., as representative of the others, and was ultimately dismissed in 1880 with costs as against all three Defendants on the ground that the title of E. B. as next of kin was not proved. After this M. took out administration de bonis non to W. J., and brought his action as such administrator against Z. for an account of the personal estate of W. J. received by the administrators whom Z. represented:—*Held*, (affirming the decision of Pearson, J.), that although M. formerly sued as personal representative of E. B., and now sued as personal representative of W. J., the action was in substance a second proceeding for the same matter under the same alleged title, and that proceedings must be stayed until the costs of the old suit had been paid. Martin *v.* Earl Beauchamp - - - - **C. A. 12**

24. —— *Third Party Procedure—Parties—Notice to co-Defendant — Leave of Court or a Judge—Rules of Supreme Court*, 1883, *Order* XVI., *rr.* 48, 55.] Under rule 55 of Order XVI., a Defendant need not obtain the leave of the Court or a Judge before issuing to a co-Defendan a notice claiming contribution or indemnity from him. But it will be open to the co-Defendant, after he has been served with the notice, to move to set aside the service. Towse *v.* Loveridge **76**

25. —— *Trial — Mode of Trial — Trial by Jury—Action assigned to Chancery Division—Official Referee—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 57—*Rules of Supreme Court*, 1883, *Order* XXXVI., *r.* 3.] An action, which falls within one of the classes of actions which, by sect. 34 of the Judicature Act, 1873, are specially assigned to the Chancery Division, will not be sent for trial by a jury unless it involves a simple issue of fact, the determination of which will decide the action.—If such an action depends on the determination of mixed questions of law and fact, it ought to be tried by a Judge without a jury, and an order will be made for its trial by the Judge of the Chancery Division to whom it has been assigned, without a jury, even though the Plaintiff has by his statement of claim proposed a different venue.—The mere fact that the action will be tried more quickly, is not a sufficient reason for sending it to be tried at the Assizes.—It was not intended by the Judicature Act that an official referee should decide the issue in an action; he is only to ascertain the facts so as to enable the Court to decide the issue. Cardinall *v.* Cardinall - - **772**

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PRINCIPAL AND SURETY—*Debtor and Creditor—Guarantee of Current Account at a Bank—Death of Surety—Appropriation of Payments.*] S. guaranteed the account of T. at a bank by two guarantees, one for £150, the other for £400. By the terms of the guarantees the surety guaranteed to the bank "the repayment of all moneys which shall at any time be due from" the customer "to you on the general balance of his account with you;" the guarantee was moreover to be "a continuing guarantee to the extent at any one time of" the sums respectively named, and was not to be considered as wholly or partially satisfied by the payment at any time of any sums due on such general balance; and any indulgence granted by the bank was not to prejudice the guarantee. —S. having died, leaving T. and another executors, the bank on receiving notice of his death, without any communication with the executors beyond what would appear in T.'s pass-book, closed T.'s account, which was overdrawn, and opened a new account with him, in which they did not debit him with the amount of the overdraft, but debited him with interest on the same, and continued the account until he went into liquidation, when it also was overdrawn:—*Held*, by Bacon, V.C., that payments in after the death of the surety went in discharge of the overdraft, alike on the terms of guarantee, and on the principle of *Clayton's case* (1 Mer. 572, 605), and that, as the amount of such payments exceeded the overdraft, the bank were not entitled to prove against the estate of the father-in-law. *Held*, on appeal, that there was no contract express or implied which obliged the debtor and creditor to appropriate to the old overdraft the payments made by the debtor after the determination of the guarantee, and that the bank were entitled to prove against the estate of S. for the amount of the old overdraft less the amount of the dividend which which they had received on it in the liquidation. *In re* SHERRY. LONDON AND COUNTY BANKING COMPANY *v.* TERRY 692

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See SETTLED LAND ACT. 1.
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RAILWAY COMPANY—*Abandonment—Application of Parliamentary Deposit—Landowner—Diminution of Value of Land—Measure of Damages.*] A railway company being about to apply for an Act of Parliament for making an extension line, assented to F., an owner of land over which the line was intended to pass, commencing the line over his own land. F. accordingly made an embankment over his land, and was paid for the work by the company. After a considerable part of the work on F.'s land had been done the company obtained their Act giving power to construct the railway in the proposed line. The Act contained a proviso that if the new line were not opened for traffic within five years the parliamentary deposit should be applied towards compensating landowners or other persons whose land had been interfered with or rendered less valuable "by the commencement, construction, or abandonment of the railway." The extension railway was not completed within five years, but no warrant of abandonment was obtained under the Railways Abandonment Act. A fresh Act was passed authorizing a petition for winding up the company and the sale of the undertaking by the official liquidator.—A petition having been presented by F.'s mortgagees and the trustee in his liquidation for the application of the parliamentary deposit in compensation for the injury done to his estate by the commencement, construction, or abandonment of the works:—*Held*, that the undertaking was abandoned within the meaning of the Act;—That the words "commencement, construction, or abandonment," must be read disjunctively;—That F., having commenced the works on his own land before the company had obtained their Act, on the speculation that they would obtain power to construct the railway, the petitioners had no claim for compensation for injury to the estate by the commencement or construction of the railway; but they had a claim for compensation for injury done by the abandonment of the railway:—That the measure of injury must be determined by comparing the value of the estate immediately before with its value immediately after the abandonment.—Whether the words "commencement of of the railway" must be confined to its commencement by the company under its parliamentary powers, or would include its commencement in

RAILWAY COMPANY—*continued.*
anticipation of such powers, *quære.*—*Held*, also, that mortgagees of the landowner might be persons entitled to claim compensation under the Act. *In re* Potteries, Shrewsbury, and North Wales Railway Company - - C. A. 251
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SETTLED LAND ACT—*Power of Tenant for Life to sell—Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), *ss.* 21, 51, 53, 56—*Previous Private Act authorizing Trustees to sell—Restriction on Exercise—Application of Purchase-money—Discharge of Incumbrances affecting part of Estate—Costs—Higher Scale—Rules of Supreme Court*, 1883, *Order* LXV., *rr.* 8, 9.] A settlement of land was made in 1853 by a private Act of Parliament. By this Act the estates were vested in the trustees thereby appointed, upon trust by sale or mortgage thereof to raise money for the purpose of discharging certain incumbrances and liabilities. The Act provided that the trustees might from time to time absolutely sell and dispose of all or any part of the estates mentioned in a schedule, provided that the trustees should not sell any of the lands situate in the parishes of C. and H., unless it should be absolutely necessary for the purposes of the Act to do so, and in case of such necessity should not sell any of those lands until all the rest of the estates were sold.—After the Settled Land Act, 1882, had come into operation the tenant for life entered into a contract to sell some of the lands situate in the parishes of C. and H. The whole of the rest of the estates had not then been sold:—*Held*, that the power of sale conferred on the tenant for life by the Settled Land Act was an absolute power over and above that given to the trustees by the private Act, and that he was therefore entitled to sell free from the restriction imposed by the private Act on the trustees.—*Held*, also, that, under sub-sect. 2 of sect. 21 of the Settled Land Act, the purchase-money could be applied in discharging a mortgage which affected part of the land sold and another mortgage which affected another part of the settled estate, and that it was not necessary that the other mortgage should be one affecting the whole of the settled estates. *In re* Chayton's Settled Estate Act - - - 651

2. —— *Sale or Lease by Tenant for Life—Notice to Trustees—Lunatic Tenant for Life—Notice by Committee — Sanction of Court of Lunacy—Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), *ss.* 45, 62.] The notice, to be given, under sect. 45 of the Settled Land Act, 1882, by the tenant for life of settled land to the trustees of the settlement for the purposes of the Act, when he is intending to make a sale or lease, must be —not a merely general notice of an intention to sell or lease all or any part of the estate at any time after the expiration of one month from the date of the notice as and when a proper opportunity shall from time to time occur—but a notice of a specific sale or lease which is contemplated at the time when the notice is given.—The committee of a lunatic tenant for life cannot give a valid notice under sect. 45 unless he has previously obtained authority from the Court of Lunacy to do so. *In re* Ray's Settled Estates [464

3. —— *Trust for Sale—Order of the Court for*

SETTLED LAND ACT—*continued.*

Sale—Concurrence of Tenant for Life not required—45 & 46 *Vict.* c. 38, *ss.* 56, 63.] A testator devised all his real and personal estate to trustees upon trust after the death of his wife absolutely to sell the whole of his property in such manner as they should think fit, and to pay one fourteenth part of the proceeds to each of his fourteen children at twenty-one or marriage, with further provisions under which his daughters' shares were settled on them for life with remainders over.—A suit having been instituted for the administration of the estate, and the wife being dead, an order was made in the suit for sale of part of the estate by the trustees:—*Held*, that the concurrence of the children constituting the tenant for life under the Settled Land Act, 1882, was not necessary upon the sale by the trustees; but even if such concurrence would be necessary the order of the Court was sufficient to enable the trustees to sell without joining the fourteen children or any of them in the conveyance to the purchaser. Taylor *v.* Poncia - - 646

4. —— *Trustees—Implied Power of Sale—Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), *ss.* 2 (8), 38, 39, 45 (2).] By settlement (*a*), executed upon the marriage of A. and B., it was declared that the trustees C. and M. should stand possessed of money upon trust that they and the survivor of them, his executors, administrators, and assigns, should continue the money on the present investments, or with the consent in writing of A. and B. or the survivor, and after the death of the survivor then of the proper authority of such trustees or trustee to sell and transfer the securities and lay out and invest the proceeds, with power from time to time with such consent as aforesaid to vary the securities. All after-acquired property, both real and personal, to be assured and settled upon the same trusts, &c., as the principal sum. Power to appoint new trustees, and to maintain, enlarge, or diminish the original number: every new trustee to have the power, &c., of the trustee in whose place he was appointed.—By settlement (*b*), executed upon the marriage of C. and D. (the sister of B.), it was declared that the trustees M. & N. should stand possessed of money upon trust to continue the same upon its then present security, or with the consent in writing of C. and D. or the survivor, and after the death of the survivor, of the proper authority of such trustees or trustee to call in the said principal money and again lay out the same in their or his names or name upon the securities therein mentioned, with power for the trustees or trustee for the time being with such consent or at such discretion as aforesaid to alter, vary, and transpose the stocks, funds, or investments to be from time to time made under the authority of the aforesaid power in any other stocks, &c., of the nature or description contemplated by the trust for investment. Covenant to settle after-acquired property similar in terms to that in settlement (*a*).—M. had died, and three new trustees of settlement (*a*) had been appointed by A. and B. N. was the sole present trustee of settlement (*b*). — Real estate had descended during their coverture upon B. and D. as coheiresses in undivided moieties. A contract for

SETTLED LAND ACT—*continued.*
the sale of this real estate having been entered into by A. and B. and C. and D. as vendors:—*Held*, upon summons under the Vendor and Purchaser Act, 1874, that under the express power contained in settlement (*a*), and the implied power in settlement (*b*); the existing trustees of both settlements had full power within the meaning of the Settled Land Act, 1882, s. 2 (8), to act as trustees under the Act, and that it was not necessary to apply to the Court under the Settled Land Act, 1882, s. 38, for the appointment of new trustees for the purposes of the Act. *In re* Garnett Orme and Hargreaves' Contract 595

SETTLEMENT—*Agreement to settle after-acquired Property of Wife—Real and Personal Property of which Wife "should become seized or possessed of or entitled to"—Construction—Estate Tail in Possession.*] A marriage settlement contained an agreement and declaration by the parties that, if the wife then was, or if, during the coverture, she, or the husband in her right, should become seised or possessed of or entitled to any real or personal property (of a specified value) for any estate or interest whatsoever, in possession, reversion, remainder, or expectancy, then and in every such case, the husband and wife, and all necessary parties, should, as soon as circumstances would admit, convey, assign, and assure the said real and personal property to, or otherwise cause the same to be vested in, the trustees of the settlement, upon the trusts thereof.—*Held*, that an estate tail in possession to which the wife became entitled during the coverture was not bound by this agreement, and that she could not be compelled either to execute a disentailing deed, and to convey the estate in fee thus acquired by her to the trustees, or to execute a conveyance of the property to the trustees, so that they could by enrolling the deed acquire an estate in fee simple.—*Held*, that the agreement extended only to the wife's estate or interest in the property acquired by her, and that it was impossible that she could convey an estate tail to the trustees. Hilbers *v.* Parkinson - - 200

2. —— *Trustees—Power to appoint—"Continuing" Trustees*—23 & 24 *Vict. c.* 145, *s.* 27.] A trustee who has made up his mind to retire, may be a "continuing" trustee, until he has executed the deed appointing new trustees. Decision in *Travis* v. *Illingworth* (2 Dr. & Sm. 344, 346) to the contrary, not followed.—By a settlement in 1867 (Lord Cranworth's Act having been passed in 1860), it was declared that it should be lawful for "the surviving or continuing trustees, in the event of any trustees declining to act, to discharge such trustees, and to appoint any new trustees; and it was provided that nothing should authorize the discharge of the only continuing trustees without the substitution of others. Of three original trustees, one having died, the other two, by deed in 1874, after reciting that they themselves "declined to act" and "desired to be discharged," and had "determined to appoint" three other persons to be trustees, "in exercise of the power for this purpose vested in them" by the settlement, appointed the three persons "to be trustees in the place of" themselves and the deceased trustee respectively:—

SETTLEMENT—*continued.*
Held, that the appointment was good. *In re* Glenny and Hartley - - - 611

—— Accumulations - - - - 729
See Accumulations.

—— Ward of Court - - - - 482
See Infant. 3.

SHARES—Transfer of - - - 118
See Company. 7.

SHAREHOLDERS—General meeting—Powers of
See Company. 2. [320

SOLICITOR—*Taxation of Bill—Ex parte Order—Special Agreement—Non-professional Work—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *s.* 8.] Where an agreement has been made for the remuneration of a solicitor, and the solicitor alleges that the remuneration was for non-professional work, the person chargeable cannot obtain the common ex parte order for the delivery and taxation of the bill of costs. The Solicitors' Remuneration Act, 1881, s. 8, has made no difference in the practice in this respect. *In re* Inderwick - - - C. A. 279

2. —— *Taxation—Charges—Pressure—Rules under Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*Percentage.*] A tenant having an option of purchase of the fee at a given price on the terms of his paying all the vendor's costs, gave notice in December, 1882, of his exercise of the option, and stated that he should not require an abstract of title. The time for completion was the 25th of March, 1883, but it was arranged for the tenant's convenience that the completion should be six weeks earlier, and that the property should be conveyed in two lots. He sent his draft conveyances for perusal before the end of December. On the 2nd of February, 1883, the vendor's solicitors sent in their bill of costs, in which they charged 30*s.* per cent. on the purchase-money of each lot, considering that this was the proper charge under Schedule I. to the general rules under the Solicitors' Remuneration Act, 1881, which provides that amount of remuneration to a vendor's solicitor "for deducing title to freehold, copyhold, or leashold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)." The purchaser's solicitors objected to these charges, but the vendor's solicitors refused to allow completion unless they were paid, and on the 14th of February the purchaser paid them under protest, and completed the purchase. After this he applied for taxation of the bill:—*Held*, by Bacon, V.C., that an order must be made for taxation of the bill with a direction that the taxation should be on the old system prevailing before the Solicitors' Remuneration Act, 1881:—*Held*, on appeal, that the case was governed by the new Rules, but that the bill was framed on an erroneous footing, for that the ad valorem remuneration authorized by Schedule I. was chargeable only where the whole of the business in respect of which it was imposed, viz., the deducing title and perusing and completing conveyance, was done; that here, as there was no deducing of title, but only perusal and completion of the conveyances, Schedule I. did not apply, but that under the General Order, rule 2 (*c*), the solicitor's

SOLICITOR—*continued.*
remuneration was to be regulated by the old system as modified by Schedule II.—But *held*, that, having regard to the dates, there was no pressure, and that there was no overcharge amounting to fraud, and that there were therefore no special circumstances to authorize taxation after payment. *In re* LACY & SON C. A. 301

—— Promoters of company—Claim against company - - - - - 103
See COMPANY. 1.

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See TRUSTEE. 1.

SPECIFIC PERFORMANCE - - 357
See VENDOR AND PURCHASER. 3.

STATEMENT OF DEBTS—Interest - 338
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8 & 9 Vict. c. 16, ss. 70, 88, 89, 91—*Companies Clauses* - - - - 320
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—— —— s. 96 - - - - - 600
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See INFANT. 3.

18 & 19 Vict. c. 134, s. 16—*Dispatch of Business* - - - - - - 384
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23 & 24 Vict. c. 145, s. 27—*Trustees* - 611
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24 & 25 Vict. c. 114—*Wills* - - 373
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25 & 26 Vict. c. 89, s. 23—*Companies* - 283
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See COMPANY. 5.

—— —— s. 115 - - - - 400
See COMPANY. 8.

—— —— s. 165 - - - - 752
See COMPANY. 3.

27 & 28 Vict. c. 95—*Lord Campbell's Amendment Act* - - - - 409
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See BANKRUPTCY. 1. [500

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—— —— s. 31 - - - - 415
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See BANKRUPTCY. 9.

—— —— s. 82 - - - - 112
See BANKRUPTCY. 3.

—— —— s. 92 - - - - 311
See BANKRUPTCY. 5.

—— —— s. 96 - - - - 400
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—— —— s. 126 - - - - 338
See BANKRUPTCY. 10.

33 & 34 Vict. c. 71, ss. 51, 54, 55—*National Debt* - - - - 231
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36 & 37 Vict. c. 66, ss. 16, 24, 73—*Judicature*, 1873 - - - - - 384
See PRACTICE. 9.

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—— —— s. 25, sub-s. 8 - - - 238
See MORTGAGE. 6.

—— —— —— - - - 413
See PRACTICE. 22.

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38 & 39 Vict. c. 36, s. 19, Sched. 6—*Dwellings Improvement* - - - 78
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38 & 39 Vict. c. 77, s. 10—*Judicature* - 587
See COMPANY. 6.

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—— —— s. 19, sub-s. 3 - - - 238
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44 & 45 Vict. c. 44, s. 8—*Solicitors' Remuneration* - - - - - 279
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45 & 46 Vict. c. 38, ss. 2 (8), 38, 39, 45 (2)—*Settled Land* - - - 595
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STAYING PROCEEDINGS—Second suit for same matter—Costs of former suit - 12
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SUBSCRIBER OF MEMORANDUM - 283
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SURVIVORSHIP—Husband—Wife's reversionary interest in term - - - 620
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TAXATION—Costs of solicitor who is a trustee
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TENANT FOR LIFE—Settled Land Act
See Settled Land Act. 1, 2. [464, 651

THIRD PARTY—Relief against—Leave of Court
See Practice. 24. [76

TRADE OR BUSINESS—Covenant in lease 206
See Covenant.

TRADE-MARK—*Trade-marks Act*, 1875 (38 & 39 *Vict. c.* 91), *rule* 33—*Application by Person aggrieved—Proprietor of Trade-mark not carrying on Business.*] The owner of a patent for a washing machine called the "Home-washer," which had been exclusively manufactured by a licensee upon payment of a royalty, registered "The Home-washer" as his trade-mark, a year before the expiration of the patent, and claimed the exclusive use of that name. The patentee had not carried on any trade connected with the manufacture of these machines for a year and nine months after the patent had expired. The licensee moved under the 33rd of the rules framed under the Trade-marks Act to have the trade-mark expunged from the register:—*Held*, that the licensee, who had been the sole manufacturer of the machines, was a person aggrieved within the terms of the 33rd rule, and that the patentee not having been engaged in any business concerning

TRADE-MARK—*continued.*
the goods within the same class for more than one year, was not entitled to retain his trade-mark. *Semble*, that the name of a patented article which has become known in the trade is not a fitting trade-mark after the expiration of the patent, since it would have the effect of extending the patent beyond its legal limit. *In re* Ralph's Trade-mark. Ralph *v.* Taylor 194

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TRANSFER OF SHARES—Pending proceedings for winding up - - - 118
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TRIAL—Mode of—Jury - - - 772
See Practice. 25.

TRUST ESTATE—Retainer of income—Expenses of action - - - - 710
See Trustee. 3.

TRUSTEE—*Costs—Taxation—Solicitor Trustee of Will—Authority by Testator to charge for non-professional Business.*] A testator by his will authorized any trustee thereof who might be a solicitor to make the usual professional or other proper and reasonable charges, for all business done and time expended in relation to the trusts of the will, whether such business was usually within the business of a solicitor or not. On the further consideration of an action for the administration of the testator's estate an order was made for the taxation of the costs, charges, and expenses of the trustees, and it was directed that the Taxing Master should have regard to the terms of the will as to the costs of the trustees:—*Held*, that the Taxing Master had power to allow to a trustee who was a solicitor the proper charges for business not strictly of a professional nature transacted by him in relation to the trust estate. *In re* Ames. Ames *v.* Taylor - - 72

2. —— *Costs, Charges, and Expenses—Priority—Insufficient Estate.*] If, in action by cestuis que trust under a creditors' trust deed against their trustees for accounts, and to have the rights of the parties ascertained, the costs of all parties are ordered to be paid out of the trust fund, and it appears probable that the fund will not be sufficient for payment of all the costs in full, the trustees are entitled to a direction for payment of their costs, charges, and expenses in priority to the costs of all other parties. Dodds *v.* Tuke - - - - - - 617

3. —— *Costs, Charges, and Expenses—Retainer of Income to meet Expenses of Actions.*—The trustees of a freehold estate of which the Plaintiff was equitable tenant for life under a will, brought actions under the advice of counsel against two persons for interfering with the property, and compromised them before trial. The Plaintiff had no notice of the proceedings, but had some time previously warned the trustees on the occasion of an injury done by persons other than the Defendants to these actions, that he should hold them liable if they did not take all necessary steps to protect the property. In December, 1881, the Plaintiff applied to the trustees

TRUSTEE—*continued.*

for the rents accrued since May, 1880. The trustees' solicitor answered stating the amount of the rents received, and saying that it was less than the costs incurred by the trustees in the action, and that they were out of pocket. A correspondence ensued, in the course of which the trustees expressed their willingness to concur in any arrangement for raising the costs out of the estate, but the Plaintiff insisted on having the rents paid to him irrespective of any arrangement for raising the costs, and brought his action to enforce payment. The Vice-Chancellor of the Lancaster Court made an order declaring that as the actions were brought without the knowledge or consent of the Plaintiff, the costs were not chargeable against the income. And the Court "being of opinion that the actions were commenced under the advice of counsel," ordered the trustees' costs of them to be raised and paid out of the estate, but ordered the trustees to pay the Plaintiff his costs of the present action up to the hearing. The Plaintiff appealed against the direction to raise the costs of the former actions out of the estate, and the trustees from the order as to the costs of the present action. *Held*, on appeal that the direction to raise the costs of the trustees of the old actions out of the estate ought to be affirmed, for that the actions appeared to have been brought bonâ fide and to have been beneficial to the estate, but that the reason given in the decree for allowing them ought to be varied, as that result did not necessarily follow from their having been commenced under the advice of counsel. But *held*, that the order on the trustees to pay costs must be reversed, and directions given for raising their costs of this action out of the estate, for that the costs of trustees properly incurred in the administration of the trust are a first charge on both the capital and income of the trust estate, and that the trustees were not bound to part with the income till their costs had been otherwise provided for, and they therefore had been guilty of no misconduct. STOTT *v.* MILNE - - - 710

—— Costs—Debtor to estate—Set off - 175
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—— Power of Sale—Settled Land Act
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See VENDOR AND PURCHASER. 2.

TRUSTEE IN BANKRUPTCY—Costs - 266
See BANKRUPTCY. 4.

VALUATION OF SECURITY—Bankruptcy 716
See BANKRUPTCY. 9.

VENDOR AND PURCHASER—*Copyholds—Enfranchisement—Acknowledgment of Right to produce Documents—Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *s.* 96—*Conveyancing and Law of Property Act*, 1881 (44 *& 45 Vict. c.* 41), *s.* 3, *sub-s.* 2, *s.* 9.] Copyhold land having been taken by a corporation under the powers of the Lands Clauses Act, and a draft conveyance from the copyholder being in the course of settlement, the corporation applied to the lord of the manor under sect. 96, for enfranchisement upon certain terms, which were agreed to. In settling the

VENDOR AND PURCHASER—*continued.*

draft enfranchisement deed, the corporation claimed to have from the lord and his trustee to uses an acknowledgment of the right of the corporation to production of the documents of title to the manor, and of the Court rolls, relating to the hereditaments enfranchised, and to delivery of copies thereof, and, also from both, an undertaking for the safe custody of the same:—*Held*, that the corporation were entitled to no more than an acknowledgment by the lord and his trustee of the right of the corporation to the production of the documents of title to the manor, and of the Court rolls, so far as they related to the hereditaments enfranchised, and to delivery of copies thereof; and an undertaking by the lord alone for safe custody.—Whether the corporation were entitled to so much as the above, *quære*. *In re* AGG-GARDNER - - 609

2. —— *Depreciatory Conditions—Commencement of Title—Recitals to be Evidence—General Power of Entry too remote.*] Trustees for sale under a will put up, in 1882, certain lands for sale by auction with conditions that the title should commence with the conveyance to the testator in 1872, and that every recital or statement in any abstracted document should be conclusive evidence of the fact or matter recited or stated. The purchaser objected to complete on the ground that these were depreciatory conditions, and also that the property was subject to certain restrictive covenants contained in a conveyance in fee, but not sufficiently disclosed by the conditions, and to a power of re-entry in case of breach of the covenants not mentioned in the conditions:—*Held*, that, under the circumstances, and as there would have been no difficulty in shewing an earlier title, the conditions limiting the title to the conveyance of 1872, and as to the recitals being evidence, were not justifiable, and that the contract could not be enforced:—*Held*, however, that an unlimited power of re-entry in the event of the breach of a covenant was void as being too remote, and was no objection to a title. DUNN *v.* FLOOD - - 629

3. —— *Misleading Condition—Statement in Auction Room—Specific Performance refused.*] A dwelling-house and offices were put up for sale by public auction, under a printed condition in a common form, that the lot was sold subject to any existing rights and easements of whatever nature—and the printed particulars made no mention of any easement, or of any claim to an easement. As the result of evidence, it appeared that the house was subject to an easement belonging to the owner of a neighbouring tenement to use the kitchen for particular purposes, and that the vendor's solicitor knew of the rumoured existence of some such easement, but forbore to make inquiries. No grant of an easement appeared from the abstract, and its existence was, in fact, disputed on the pleadings. In the auction room the Plaintiff's solicitor said he had heard of some such claim, but had no definite information about it, and the auctioneer, in hearing of the Plaintiff's solicitor, on being questioned, told the audience that they might dismiss the subject of the rumoured claims from their minds, as nobody would probably ever hear of them again:—*Held*,

VENDOR AND PURCHASER—*continued.*
that the conditions were misleading, and the statements in the auction room insufficient, and specific performance of the contract refused. Heywood *v.* Mallalieu - - - 357

4. —— *Rescission of Contract—Discharge of Incumbrances on Sale—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 5.]. The Court will not, under the power given to it by sect. 5 of the Conveyancing Act, 1881, compel a vendor of land to pay money into Court for the purpose of discharging an incumbrance upon the land, when the result of so doing would be to inflict a great hardship on him, as, for instance, if the incumbrance is a perpetual rent-charge, and the sum necessary to procure its discharge would far exceed the amount of the purchase-money payable to the vendor.—A railway company contracted to sell some superfluous land "free from incumbrances," for £868. The contract provided that, if the purchaser should decline to waive any valid objection to the title, the company might at any time rescind the contract, without paying the purchaser any costs or compensation. The abstract of title shewed that the land was subject to a perpetual rent-charge of £63 issuing out of it, this being the consideration for which the company had purchased it under their statutory powers, for the making of a railway, which, by a subsequent Act, they were authorized to abandon.—The purchaser required the company to procure the release of the land from the rent-charge. This they declined to do, but offered to imdemnify him against it. He declined to waive his requisition:—*Held*, that the company were entitled to rescind the contract under the condition, and that they were not bound to apply to the Court, under sect. 5 of the Conveyancing Act, 1881, to declare the land freed from the rent-charge, or to take any other steps to procure the release of the rent-charge. *In re* Great Northern Railway Company and Sanderson [788

VOLUNTARY WINDING-UP—Transfer of shares *See* Company. 7. [118

WAIVER—Statutory rights—Charter - 511
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WARD OF COURT—Settlement - 56, 482
See Infant. 2, 3.

WATER—Supply of—Private bath 443, 446, n.
See Waterworks Company. 1, 2.

—— Supply of—Right to repair pipes - 182
See Easement. 1.

WATERWORKS COMPANY—*Supply of Water by Measurement—Private Baths—Meters supplied by Consumer.*] The Sheffield Waterworks Company claimed a declaration that they were not bound under their Acts of Parliament to supply water for private baths except upon the terms of the consumer providing at his own expense a meter or other automatic self-registering instrument for the accurate measurement of the water used. The Defendant alleged that it was for the company who supplied the water to measure the quantity to be paid for:—*Held*, upon the construction of the various Acts under which the proceedings of

WATERWORKS COMPANY—*continued.*
the company were regulated, that it was not correct to treat the company as supplying the water to the consumer, but it was the consumer who was entitled to draw off from the main what water he required, and to fix pipes and apparatus at his own expense for the purpose of measuring the water so taken by him; and such measurement could only be effected by some sufficient automatic self-registering meter or other instrument, or in some other equally accurate mode. Sheffield Waterworks Company *v.* Bingham [443

2. —— *Supply of Water—Private Baths.*] *Held*, on the construction of the Sheffield Waterworks Company's Act that they have a right to make an extra charge for private baths. Sheffield Waterworks Company *v.* J. E. Bingham [446, n.

WIDOW—Annuity to—Voidable marriage 685
See Will. 1.

WILL—*Condition—Annuity to Wife "so long as she shall continue my widow and unmarried"—Voidable Marriage — Substitutionary Gift.*] A testator, after giving a legacy of £200 to his wife, directed his trustees "in addition thereto to pay to my said wife, so long as she shall continue my widow and unmarried, an annuity of £300, or otherwise in lieu and in substitution of the said annuity, at the option of my said wife if she shall prefer it, a legacy of £2000." After the date of the will the marriage was declared null by the Divorce Court in a suit brought by the wife against the testator. After this the testator died leaving the lady surviving. Fry, J., held that she was entitled to the legacy of £200, but was not entitled either to the annuity or the £2000. She appealed from this decision so far as it was unfavourable to her:—*Held*, that although if the lady had been the testator's wife at his decease the words "shall continue my widow and unmarried," might have been in substance the same as "shall continue unmarried," the reference to widowhood could not on that ground be treated as surplusage, but was the principal part of the condition, and that as the lady did not at the testator's death fill the position of the testator's widow, she could not take the annuity. *Held*, further, that she could not take the £2000, for that an option to take a legacy instead of an annuity could not exist if there was no right to take the annuity; and, moreover, that a gift by way of substitution for another is subject to the same conditions as the original gift.—*Rishton* v. *Cobb* (5 My. & Cr. 145) doubted. *In re* Boddington. Boddington *v.* Clairat - - 685

2. —— *Condition — Devise of House and Grounds—Forfeiture in case of non-Residence—What will amount to Residence.*] Testator devised a messuage and hereditaments in the country to the use of his son G. for life, "provided as a sine quâ non" that he "within six calendar months after my decease shall enter upon and take actual possession of" the messuage and hereditaments "as and for his residence and place of abode;" and "shall as such tenant for life thereinafter during his life continue to reside in or upon the same capital messuage for at least six calendar months (but not necessarily consecutively) in every

WILL—*continued.*

year." After G.'s death "or his failing to take such possession as aforesaid and to reside in" the house, testator devised the same to G.'s first and other sons in tail male. G. entered and took possession within six months after the testator's decease; but as to residence, during the year following the expiration of the six months, he was in the house for eighteen days only; and from the 1st of January to the 28th of December in the year following the date of such expiration, for no more than twenty-four days. He had, however, placed the house in charge of a staff of servants, he had paid the rates, he had kept horses and poultry in the stables and on the grounds, and his son, who was at a college near, had stayed at the house on an average on every alternate Saturday till Monday:—*Held*, that no forfeiture of G.'s life estate had taken place. *In re* MOIR. WARNER *v.* MOIR - - - - - **605**

3. —— *Condition—Life Estate determinable on Bankruptcy—Gift over to Children—Time for ascertaining Class.*] A testator gave a fund to trustees, upon trust to pay the income to his son during his life, and after his death to pay and divide the fund equally amongst all the children which the son might have, as and when they should respectively attain twenty-one, and, if there should be no child who should attain twenty-one, the fund was to sink into the residue of the testator's estate. There was a proviso that, if the son should be adjudicated a bankrupt, the fund, and the income thereof, should thenceforth immediately go and be payable or applicable to or for the benefit of the child or children of the son, "in the same manner as if he was naturally dead," or, in default of such child or children, should sink into the residue. After the death of the testator the son was adjudicated a bankrupt. At the date of the adjudication he had two children; other children were born to him afterwards:—*Held*, that the children born after the adjudication, as well as those born before, were entitled to share in the fund, subject to the contingency of their attaining twenty-one.—*In re Aylwyn's Trusts* (Law Rep. 16 Eq. 585) observed upon. *In re* BEDSON'S TRUSTS - - **458**

4. —— *Death leaving Children—Gift of Property to Trustees to pay Debts and Annuities, and to convey, &c., Residue to Son absolutely—Death of Son leaving Children, Trustees to convey to them absolutely—Death of Son in Testatrix's Lifetime, without leaving Children, Gift over—Son survived Testatrix, and entitled absolutely.*] Testatrix gave all her real and personal estate to trustees in trust to pay all her debts, &c., and certain annuities, and then as to the residue of her estate directed them to convey, assign, or otherwise assure the same unto and to the use of her son, his heirs, executors, &c., absolutely. And if her son should marry, and should die leaving children who should live to attain the age of twenty-one years, the trustees were to convey, &c., the residue to such children equally, as tenants in common absolutely, but if her son should die in her lifetime without leaving children or a child surviving, then the trustees were to convey, &c., the residue to the persons named for their absolute use and benefit. The son

WILL—*continued.*

married after the date of the will in the lifetime of the testatrix, survived the testatrix, and had children living:—*Held*, that death leaving children meant death in the lifetime of the testatrix, and that that not having happened, the son became, subject to the payment of debts and annuities, entitled absolutely to the residue. *In re* LUDDY. PEARD *v.* MORTON - - **394**

5. —— *Gift to Individuals or to a Class—Personæ designatæ.*] Bequest of residue "In trust for my son George, my daughters Lydia, Mary Ann, Alice, and Frances, and such of my child or children, if any, hereafter to be born as shall attain the age of twenty-one years or marry, in equal shares as tenants in common, but subject, as to the share of any daughter, whether now living or a child hereafter to be born, to the trusts following—" the share of "such daughter" being settled. The testator had six children only, the five named and one other, all of whom had attained twenty-one at the date of the will. Of the named children two died in the testator's lifetime without issue, and three survived him:—*Held*, that the five named children took as a class and not as individuals, and that the whole residue was divisible among the three who survived the testator.—*Re Stanhope's Trusts* (27 Beav. 201) followed. *In re* JACKSON. SHIERS *v.* ASHWORTH [162

6. —— "*Heirs*"—*Gift of real and Personal Estate together—Substitution.*] A testator gave, devised, and bequeathed to his wife all his property, real or personal, on trust for herself for her life, and after her death the whole of his property was to be equally divided among all his children, "or such of them as may be then surviving, or their heirs." The testator had five children, all of whom survived him. Of these children two daughters died before the wife, leaving children:—*Held*, that the word "heirs" had a twofold meaning, viz., heir-at-law as regarded the real estate and next of kin as regarded the personalty: *Held* also, that the property was divisible in fifths,—each surviving child of the testator taking one-fifth, and the heir-at-law and next of kin of each deceased daughter taking between them (according to the nature of the estate) one-fifth share.—*Wingfield* v. *Wingfield* (9 Ch. D. 658) followed.—*Smith* v. *Butcher* (10 Ch. D. 113) distinguished. KEAY *v.* BOULTON [217

7. —— *Interim Income—Contingent deferred Legacy payable out of Residue—Rest of Residue payable first—Gift of "rest" of Residuary Estate—Severance for Convenience of Estate—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.] A testator by will, after giving his real and personal estate upon trust for sale and conversion and payment of debts and legacies, directed the trustees to stand possessed of the residue of the trust moneys upon trust, in the first place, to pay thereout £1500 to be equally divided between such of six legatees whom he named as should be alive at the death of A. B.; such shares to be paid to them respectively on attaining twenty-one or marriage. "And as to the rest of his residuary estate" upon trust for X. Y. A. B. and the six legatees all survived

WILL—*continued.*

the testator and were still living. The trustees having set apart and invested £1500 to meet the legacy, X. Y., the six legatees, and the next of kin of the testator, all claimed to be entitled to the income thereof during the life of A. B.:—*Held*, that such income passed under the gift of the rest of the testator's residuary estate, and that X. Y. was entitled thereto during the life of A. B. Where a contingent deferred legacy has been severed from the general estate of a testator, such severance will not entitle the legatee to interim interest thereon unless the severance has been necessitated by something connected with the legacy itself. Trustees cannot, under sect. 43 of the Conveyancing Act, 1881, apply the income of an infant's contingent legacy for the benefit of the infant, unless the income will go along with the capital of the legacy if and when such capital vests. *In re* Judkin's Trusts - - 743

8. —— *Residuary Gift—Bequest of "the money of which I am possessed."*] In construing a will no absolute technical meaning should be given of such a word as "money," the meaning of which must depend upon the context, if any, and such surrounding circumstances as the Court can take into consideration. A testatrix who was possessed of cash, securities, leaseholds, furniture, and effects, by her will, made in expectation of her death, which occurred two days after its date, gave "one half of the money of which I am possessed to H., and the remainder equally between O. and S., and after them to their children":—*Held*, that the word "money" passed all the personal estate. *In re* Cadogan. Cadogan *v.* Palagi - - - - - - 154

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